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RECORD, CASE No. 13,831.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1892.

TERM No., 224.

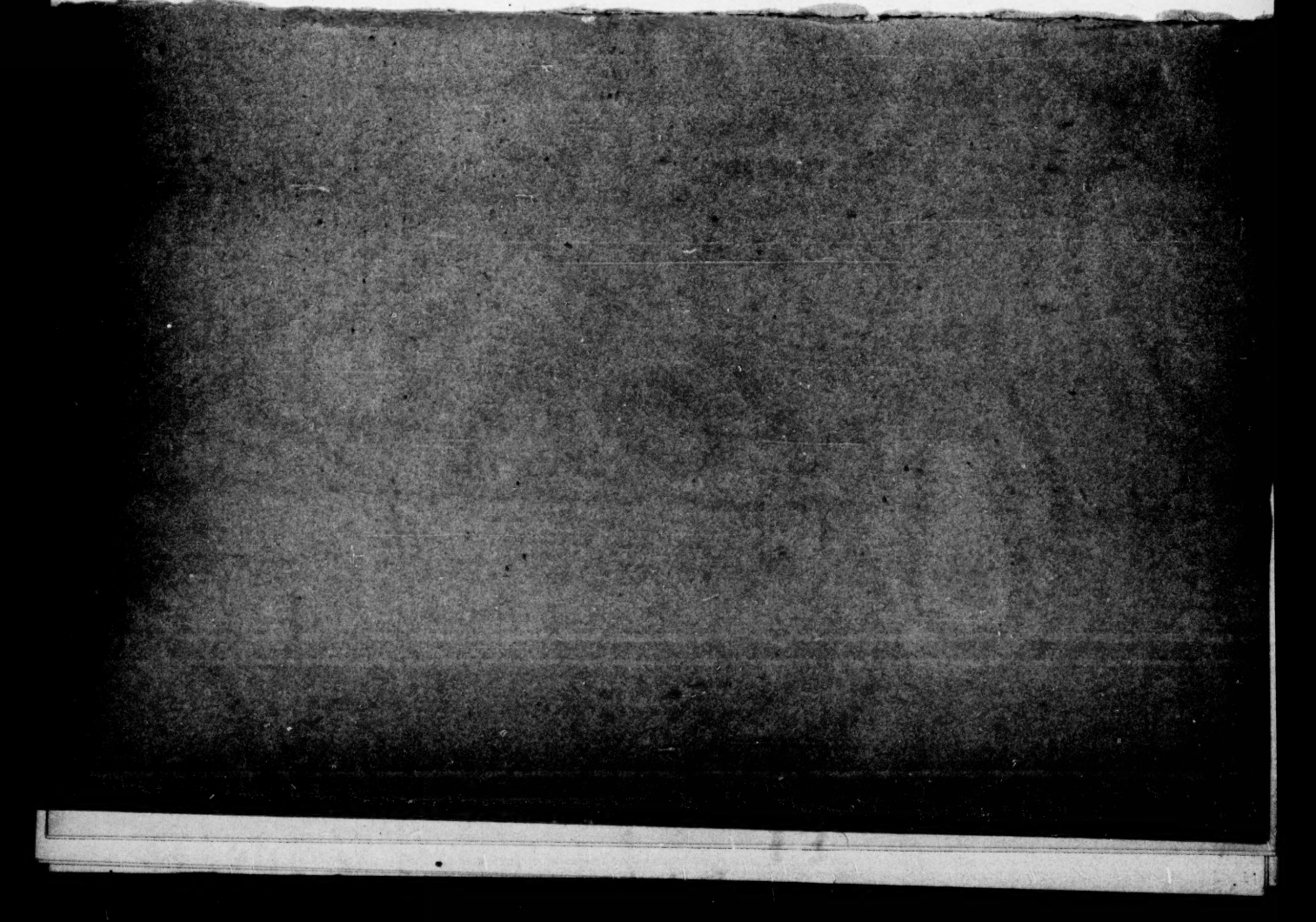
THE METROPOLITAN NATIONAL BANK OF NEW YORK, APPELLANT,

vs.

THE ST. LOUIS DISPATCH COMPANY, THE DISPATCH PUBLISHING COMPANY OF ST. LOUIS, AND HENRY L. SUTTON, TRUSTEE.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MISSOURI.

FILED OCTOBER 19, 1889.



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1 UNITED STATES OF AMERICA,
Eastern Division of the Eastern Judicial District of Missouri, } *ss:*

In the Circuit Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri.

Be it remembered that on the first day of July, A. D. 1887, the following, among other, proceedings were had and appear of record in said court, to wit:

Bill of Complaint Filed.

METROPOLITAN NATIONAL BANK OF NEW YORK, Complainant,
vs.
THE ST. LOUIS DISPATCH COMPANY *et al.*, Defendants. } 2883.

Now comes the complainant, by John M. Dickson, its solicitor' and files its bill of complaint.

And thereupon it is ordered that a writ of subpœna in chancery be issued herein as prayed in said bill and made returnable to August rules, 1887.

And afterwards, to wit, on the twenty-first day of April, A. D. 1888, there was filed in said cause an amended bill of complaint in words and figures following, to wit:

2 *Second Amended Bill of Complaint.*

UNITED STATES OF AMERICA,
Eastern Division of the Eastern Judicial District of Missouri, } *ss:*

In the Circuit Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri.

THE METROPOLITAN NATIONAL BANK OF NEW YORK, Complainant,
vs.
THE ST. LOUIS DISPATCH COMPANY, THE DISPATCH Publishing Company, and Henry L. Sutton, Trustee, Defendants. } In Equity.

To the judges of the circuit court of the United States for the eastern division of the eastern judicial district of Missouri:

The Metropolitan National Bank of New York, and a citizen of the State of New York, brings this its second amended bill against The St. Louis Dispatch Company of St. Louis, and a citizen of the State of Missouri; The Dispatch Publishing Company of St. Louis, and a citizen of the State of Missouri, and one Henry L. Sutton, trustee, and a citizen of the State of Missouri.

And thereupon your orator complains and says that it, The Met-

ropolitan Bank of New York, is a body politic and corporate, organized and existing under and by virtue of the laws of the United States.

That on the first day of June, A. D. 1877, the St. Louis Dispatch Company was a body politic and corporate, organized and existing under and by virtue of the laws of the State of Missouri, and
3 was a citizen and resident of the said State of Missouri; that said corporation ceased active business as the publisher of a newspaper, as hereinafter stated, on the 9th day of December, 1878.

That the Dispatch Publishing Company is a body politic and corporate, organized and existing under and by virtue of the laws of the State of Missouri, and owns no property unconnected with and not appurtenant to the publication of a newspaper.

That on or about the first day of June, A. D. 1877, the said "The St. Louis Dispatch Company" owned a certain daily evening newspaper in the city of St. Louis known as the "St. Louis Dispatch," and no other property whatsoever unconnected with and not appurtenant to the publication and operation of said newspaper; that the said "The St. Louis Dispatch," a newspaper, had been published continuously and daily for many years, to wit, since on or about the year 1852, and continued to be published daily, excepting Sundays, up to the date hereinafter mentioned; that the said "The St. Louis Dispatch," a newspaper, was on the first day of June, A. D. 1877, a fully equipped journal, having a building under lease, all the machinery, type, presses, cases, forms, paper, furniture, and tools useful or necessary for the printing and publishing of the same, a good circulation and advertising patronage (known as its good will), and a share of stock in the Western Associated Press, under which it was entitled to receive telegraphic news and dispatches collected from all parts of the world, as hereinafter more particularly set forth.

That on the said first day of June, A. D. 1877, the said, "The St. Louis Dispatch Company" being greatly in need of money wherewith to meet the current expenses and obligations of said newspaper, the said company entered into a certain indenture in the nature of a mortgage with one Frank J. Bowman, then of St. Louis, Mis-
4 souri; that the said "The St. Louis Dispatch Company" was named in said indenture as party of the first part, and one Henry L. Sutton, a citizen and resident of the State of Missouri, as party of the second part, and the said Frank J. Bowman as party of the third part; that by the terms of said mortgage "the St. Louis Dispatch Company" granted, bargained, and sold to the said Henry L. Sutton, in trust for the purposes therein mentioned, the machinery, type, presses, cases, furniture, paper, forms, and tools, together with the good will of said St. Louis Dispatch Company, and its franchises of every kind and description, rights, privileges, and property, including its interest in the Western Associated Press, and any and all shares by it owned in said Western Associated Press, as also all accounts and choses in action or other valuable things by it, the said St. Louis Dispatch Company, owned or to it belonging, wherever situated; also all other property of every other nature and

character which said party of the first part may acquire during the existence of this deed of trust, the said machinery, type, presses, cases, furniture above described (now) then occupied by the said "The St. Louis Dispatch Company" at the place aforesaid.

And the said Henry L. Sutton accepted the trust reposed in him.

And your orator further states that the said indenture in the nature of a mortgage was filed for record in the office of the recorder of deeds in and for the city of St. Louis, on the 2nd day of June, 1877, and recorded in Book 572, page 314, of said office.

And your orator herewith files the original of said indenture in the nature of a mortgage, marked Exhibit "A," and prays that the same may be made and taken as a part of this complaint.

And your orator further shows that at the time of the exe-
5 cution of said indentures the Western Associated Press was a body politic and corporate, organized under an act of the legislature of the State of Michigan entitled "An act to provide for the incorporation of associations engaged in the publication of newspapers, periodicals, books, and other matter," approved March 21st, 1865, and has its chief office in the city of Detroit, in said State; that the sole purpose and object of its existence as a corporation was and is, as expressed by and in its articles of association filed in pursuance of the above act, to procure intelligence for the newspaper press from all parts of the world by telegraph, express, mail, or otherwise, and membership in said association was and is limited generally and specifically to owners and proprietors of newspapers and publishers of periodicals.

And your orator further shows that at the date of said indenture and long prior thereto the said "St. Louis Dispatch Company" was the legal owner on the books of said association of one share of stock issued by said Western Associated Press to said St. Louis Dispatch Company, represented by certificate No. 38, and then held by and in the possession of the said last-named company; that contemporaneously with the execution of said indenture the St. Louis Dispatch Company assigned and set over by a writing on the back of said certificate No. 38 its right, title, and interest in said certificate in trust for the purposes of said indenture and no others to the said Henry L. Sutton, the said party of the second part, in manner and form as follows:

"The within certificate of stock is hereby assigned and transferred to Henry L. Sutton, trustee in deed of trust bearing date of June 1st, 1877, for like purposes as other property therein named is transferred, being the certificate of stock in the Western Associated Press therein referred to."

6 (Signed) W. R. ALLISON, *President*,
For ST. LOUIS DISPATCH CO.

Attest:
(Signed) E. W. FOX, *Secretary*.

That said membership in said "The Western Associated Press" was ans is of very great value, to wit, of the value of fifty thousand dollars.

And your orator herewith files said certificate, marked Exhibit "B," and assignment thereof and prays that that may be made and taken as a part of this complaint.

That said last-named indenture was so executed for the purpose of securing a certain promissory note of even date therewith for the sum of fifteen thousand dollars, payable two years and six months after date to the order of Frank J. Bowman, with interest from date at the rate of 9 % per annum, payable at Exchange bank, in the city of St. Louis, Missouri, interest payable as follows: One and one-half per cent. on the first day of August, and a like amount on the first day of October, December, February, April, and June in each year until the payment of said principal sum; and your orator herewith files the said note, marked Exhibit "C," and prays that it may be made and taken as a part of this complaint.

Further complaining, your orator showeth that said indenture in the nature of a mortgage embraced all the property then owned by the St. Louis Dispatch Company or thereafter to be acquired.

And your orator further showeth that the said note, secured by said indenture, was issued and negotiated for value, and that the Metropolitan National Bank of New York is and was prior to its maturity the legal holder for value of the same.

And your orator would further show that on or about the 2nd day of February, 1878, the said "St. Louis Dispatch
7 Company," as party of the first part, entered into a certain other and second indenture in the nature of a mortgage bearing said date, in which said indenture one Robert S. McDonald was party of the second part and the Wolcott & Hume Company of St. Louis, Missouri, and any and all other lawful holder or holders of said bonds or any of their parts were parties of the third part.

And your orator herewith files a true copy of said last-named mortgage, marked Exhibit "D," and prays that the same be taken as a part of this bill of complaint; that by the terms of said indenture the said St. Louis Dispatch Company assigned and conveyed to the said Robert S. McDonald, in trust for the purposes therein mentioned, all of the property described in said first indenture, as well as a large amount of property connected with the issue and publication of the newspaper acquired since the date of said first mortgage, subject, however, expressly to the payment of the note recited in and secured by said first deed of trust in the nature of a mortgage; that the said second deed of trust was intended to secure an issue by said St. Louis Dispatch Company, for the purpose therein expressed, of bonds to the amount of thirty thousand dollars, payable on the 20th day of January, 1883, with interest from date at the rate of 8 % per annum, payable on the 20th day of July and January of each year.

And your orator further shows that the second deed of trust in the nature of a mortgage was filed for record in the book marked P. P. No. 8, page 68, of the office of the recorder of deeds for the city of St. Louis, Missouri, on the 4th day of February, 1878.

And your orator further shows that the interest on said bonds coming due remained unpaid after a legal demand, made in accordance

8 with the terms expressed on the face thereof, and in pursuance of the terms of the said second indenture and within the time therein specified the said Robert S. McDonald did, on the 9th day of December, 1878, advertise the said St. Louis Dispatch newspaper and its property conveyed and assigned as aforesaid by said St. Louis Dispatch Company, its good will, franchises, and other property, including said St. Louis Dispatch Company's membership in the Western Associated Press, and all property, both tangible and intangible, for sale, and did sell same, expressly subject to the payment of debt secured by said first mortgage in the manner and under the terms specified in the said second mortgage; that at the sale one Simon Arnold was the highest bidder and became purchaser of said property with full notice of the lien of said first mortgage.

Your orator states that at or about the time of the said conveyance or sale of said property to Simon Arnold one John A. Dillon was owner and publisher of a certain newspaper known as the "Evening Post," and was printing and publishing the same in said city of St. Louis; that the said "Evening Post" was the rival and competing newspaper of the said "Dispatch;" that said "Post" did not nor did John A. Dillon own a membership in the Western Associated Press nor any right to the telegraphic news and dispatches thereof; that the said "Evening Post" had not nor had the said John A. Dillon in the business of carrying on and publishing said "Post" any presses, type, or paraphanalia for the printing or publication of a newspaper; that the said "Evening Post" had not been established until a few months before the sale of said St. Louis Dispatch newspaper and had nothing of value, nor had the said Dillon in connection with said publication, excepting a small circulation and advertising patronage and the name "Post."

9 Your orator avers that on the same day, to wit, on the 9th day of December, 1878, upon which — the sale as aforesaid to Simon Arnold took place, the said Arnold transferred the St. Louis Dispatch newspaper, consisting of the good will of the St. Louis Dispatch Company, the name "Dispatch," its interest and membership in the Western Associated Press, together with all its property, tangible and intangible, rights, causes, choses in action, and all the other property as recited in the description of said first mortgage, to one Joseph Pulitzer, who took the same with full notice of the lien in said first mortgage and subject thereto; that on the 10th day of December, 1878, the day following the sale aforesaid, the said John A. Dillon, owner and publisher of the said "Evening Post," and the said Joseph Pulitzer, owner of an equity of redemption in the good will and other properties and franchises, including the membership in the Western Associated Press of the St. Louis Dispatch Company, consolidated the said "Evening Post" and the St. Louis Dispatch newspaper, and on that day published the consolidated paper under the name of the "Post-Dispatch," and the said John A. Dillon acquired whatever interest in said Dispatch property which came to him with full notice of the lien of said first mortgage and subject to the lien of said first mortgage; that on the 11th day of December, 1878, the said "Dispatch Publishing Company" was

organized as a corporation under the laws of the State of Missouri, the object of which was the publication of a newspaper to be known and called the "Post and Dispatch," which articles of incorporation are herewith filed and marked Exhibit "E."

That on the 11th of December, 1878, the said Pulitzer and Dillon, having as aforesaid consolidated the two papers known as the "Evening Post" and the "St. Louis Dispatch," and being severally the owners of the same, transferred the same to the Dispatch Publishing Company, which company took the same, subject to
10 the mortgage on all the property of the said "St. Louis Dispatch Company" and with full notice thereof; that on the day (the said "Evening Post" and said Dillon having as aforesaid no tangible property of any kind or description used in the operation and publication of a newspaper) defendant Dispatch Publishing Company entered into the possession of the building theretofore occupied by the St. Louis Dispatch Company in the publication of St. Louis Dispatch, at No. 111 North 5th street, in the city of St. Louis, Missouri, and entered into the possession of the good will of said newspaper with the presses, cases, type, furniture, paper, forms, and tools and all the property appurtenant to the publication of the St. Louis Dispatch newspaper, its right, account, choses in action, and, in a word, into all the rights, property, and franchises recited in the description of the deed aforesaid, including the membership in the Western Associated Press, represented then by certificate No. 38, and theretofore assigned as aforesaid to Henry L. Sutton, trustee of said first mortgage.

That ever since the Dispatch Publishing Company thus entered into the possession of the said St. Louis Dispatch, its property and its office, it has had the good will of said Dispatch Company and still has it in its possession and under its control, and has had in its possession and under its control the said name "Dispatch;" that after the Dispatch Publishing Company thus entered into the control and possession of the property of the St. Louis Dispatch Company it used the building in which said St. Louis Dispatch Company's newspaper had been published, together with all the property of the said company, including all the machinery, presses, type, and material and all tangible property recited in said first mortgage, contained in said building No. 111 North 5th St.; that after the
11 defendant Dispatch Publishing Company thus entered into possession of the said good will, membership, and other property, tangible and intangible, of the St. Louis Dispatch Company it paid the interest on said note of $15,000—*i. e.*, one and one-half per cent. on the first days of February and a like amount on the first days of April, June, and October, of the year 1879, being the interest due on said note before its maturity, the remaining installment being payable on the first day of December, 1879, being same day upon which the principal of said note became due.

That after the Dispatch Publishing Company entered as aforesaid into the possession of the good will and appurtenances of the said St. Louis Dispatch Company and into the use of membership in the said Western Associated Press, subject to the rights of the mortgages

herein, it continued as it might to receive the news, dispatches, etc., and to enjoy all the rights and privileges formerly enjoyed by the St. Louis Dispatch Company in said association by virtue of share 38, standing then and for a long time after, to wit, until the — day of ——, 18—, on the books of the Western Associated Press in the name of the St. Louis Dispatch Company; that on the first day of December, 1879, the principal of said note became due.

That at the time when said note matured the Dispatch Publishing Company refused to pay the same. Whereupon Trustee Henry L. Sutton demanded of the Dispatch Publishing Company the property of the St. Louis Dispatch Company, including its good will and all the property recited in said first mortgage, which Dispatch Publishing Company wholly refused and still refuses to surrender.

That at the time of said note's maturity and the demand for payment of same and of trustee's making such demand said Dispatch Publishing Company had alienated, destroyed, or gradually used up all the machinery, type, presses, and property of a per-
12 ishable nature of the said St. Louis Dispatch Company.

Your orator avers that the good will of the newspaper and of the said St. Louis Dispatch newspaper is and was in the case of the latter the chief element of value to the newspaper publication; that the good will of the Dispatch newspaper was of very great value, to wit, of the value of $—.

That the good will was so acquired as aforesaid by the Dispatch Publishing Company of the St. Louis Dispatch Company and has been in the constant use, possession, and control of the said first-named company from the date of its so acquiring the property of the St. Louis Dispatch Company until the present time, and is now, and has never been, in whole or in part, alienated.

And your orator avers that the name of a newspaper is valuable to it for the maintenance and increase of its good will (being its circulation and advertising patronage), and is salable, and that said Dispatch Publishing Company acquired its name "Dispatch" under said second mortgage subject as aforesaid to the lien existing upon it, and the said Dispatch Publishing Company still retains the name (Dispatch) in the publication of the newspaper in its possession and under its control.

Your orator further avers that the machinery, presses, type, and all the paraphernalia for printing and publishing a newspaper as described in the said deed were acquired at the sale in the second mortgage and subject to said deed of trust, and was property appurtenant to the publication of said newspaper, and at the date of its acquisition by the said Dispatch Publishing Company the last-named company entered into possession and use of the said machinery, presses, type, etc., and continued to use the same in the operation of the business of publishing a newspaper for a long time thereafter; but your orator avers that from time to time it
13 substituted new paraphernalia for publishing said newspaper, and that in the conduct of said business in the stead of the property so acquired and during the year 1879, from January to December thereof, and whilst the Dispatch Publishing Company

was paying the interest on said debt and until the maturity of the note aforesaid, the defendant Dispatch Publishing Company had thus placed in the building where said newspaper was published, to wit, at 111 North 5th St., new presses, type, and machinery, and that on that date it had none of the original presses, type, and paraphernalia for printing a newspaper described in said deed of mortgage.

Your orator avers further that the first mortgage was a mortgage upon the good will and appurtenances of every kind and description of the St. Louis Dispatch Company, then and thereafter engaged in the publication of a newspaper; that said mortgage was made with the view and purpose of subjecting said good will of said company sustained by a newspaper publication to the lien of said mortgage and all the property appurtenant to said publication which was used in connection with the support of said good will.

Your orator further avers that the good will of a publication is the essential element of value in it; that it constitutes the newspaper and did constitute this newspaper as a property; that all the parts of a newspaper and of the said Dispatch newspaper constitute one homogeneous whole, and that the newspaper as a security depended for its value upon the integrity of all its parts; that said mortgage was and is a lien upon that good will represented by a publication and all appurtenances of that publication considered as one homogeneous property as well as upon every distinct portion thereof.

And your orator avers and charges that the presses, type, paraphernalia, and material for printing and conducting the
14 business of publication, now in the hands of the Dispatch Publishing Company, were substituted in the stead of the property acquired by it from said St. Louis Dispatch Company, subject to the mortgage aforesaid for the maintenance and support of the good will of said company, likewise so acquired.

And your orator further avers that the Dispatch Publishing Company has now in its possession the entire good will of the St. Louis Dispatch Company and all the property used in connection with the support thereof or substituted for said appurtenant property, including the membership in the said Western Associated Press, represented by certificate 64 and standing in the name of the Dispatch Publishing Company on the books of that association, as hereinafter more particularly set forth.

But your orator further avers that the defendant Dispatch Publishing Company pretends that the good will of the St. Louis Dispatch Company, as well as said membership, were wholly lost, because since the time of the consolidation of said "Post & Dispatch" the newspaper published by it has been called and known as the "Post-Dispatch" instead of the St. Louis Dispatch, and that all rights respecting said membership were wholly lost for the same reason—that is to say, the good will of said St. Louis Dispatch Company, being entirely dependent on a publication for its support, losing the support of the publication known and called the St. Louis Dispatch, went out of existence upon the consolidation of the Post & Dispatch, and the said membership held and mortgaged by said

St. Louis Dispatch Company, being dependent for its life and value upon a publication in connection with its tenure, likewise ceased to be of value and was properly forfeitable at the time when the said consolidation took place, and the said St. Louis newspaper *eo nomine* ceased publication.

15 II.

But your orator avers that when the defendant Dispatch Publishing Company acquired the two properties known as the "Evening Post" and the "St. Louis Dispatch" it acquired the said Evening Post unencumbered and the St. Louis Dispatch subject to said mortgage, and your orator avers that, the said St. Louis Dispatch newspaper and its appurtenant properties being incapable of separation from the said Post-Dispatch, the lien of the mortgage aforesaid attaches and is attached to all property of the defendant Dispatch Publishing Company; that the Dispatch Publishing Company when it went into possession of the St. Louis Dispatch newspaper, the day after the consolidation with the Post and two days after its acquisition by Pulitzer and Arnold, recognized the validity of the mortgage lien on the said good will and appurtenant property, including membership in the said Western Associated Press, by paying the interest on said mortgage debt and sustaining said membership in said Western Associated Press, and this complainant avers that by said payment of interest on said debt and its recognition of validity of said mortgage on the good will, membership, and other property of the St. Louis Dispatch Company—the retention of its name Dispatch—the complainant and the trustee in said deed if trust were induced to believe that the said Dispatch Publishing Company would pay the debt secured upon said property or would surrender said property to it in case of the failure of the conditions of said deed; that though the confusion of the good wills of said Dispatch Company with that of the Dispatch Publishing Company occurred on the 10th day of December, 1878, the said Dispatch Publishing Company continued to acknowledge the validity of said mortgage, and the complainant herein and the said trustee did not enter into the mortgaged tangible property whilst the Dispatch Publishing Company
16 was using its presses, type, machinery, and appliances for the publication of said Post-Dispatch newspaper in the building occupied by said St. Louis Dispatch Company at the time of the sale under said second mortgage nor at any time thereafter, when, without knowledge and consent, it disposed or alienated all of said tangible property for the reason that the trustee in the said mortgage and the mortgagees were promptly paid the interest due on said mortgage and no claim, either in reference to said membership or in reference to any of said property, tangible and intangible, acquired from St. Louis Dispatch Company in antagonism to the rights of the mortgagees was made; that the said Dispatch Publishing Company continued to recognize said mortgage as a lien on said property, including said membership, up to and until the very maturity of said note; and your orator avers that said interest being promptly

paid after the consolidation of said newspapers, and no adverse claim being set up to the good will of said Dispatch newspaper, and the said name "Dispatch" being retained in said publication, and the assessments on said membership being promptly met when due, and all the acts and conduct, as well as the silence of said company, in respect to the claim subsequently set up, inducing them thereto, they did permit the said Dispatch Publishing Company to remain in the possession of the property of St. Louis Dispatch Company, the said acts having induced them to believe that new machinery, presses, type, and paraphernalia purchased from time to time were purchased and intended as substitutions for similar property of said St. Louis Dispatch Company which they supplied.

That the said payment of interest on said debt and assessments on said membership, the retention of said name "Dispatch," and its use of the mortgagors' building and all tangible property
17 therein in conection with the publication of a newspaper and its absolute silence respecting any adverse claim to said Dispatch Company's property and the continued payments of interest and silence after its removal from the mortgagors' building were, your orator state-, acts done and maintained with the view and purpose of inducing the said mortgagees and said trustee to believe, and they did, that the Dispatch Publishing Company held the good will and all the appurtenances, tangible and intangible, of said St. Louis Dispatch Company and as amalgamated with the property of said Dillon, to wit, the "Evening Post," as subject in its hands to the said mortgage.

And your orator avers that said trustee and the mortgagees and complainant acted upon said inducements thus held out by said defendant respecting the validity of said mortgage upon the good will and other properties of the mortgagor in the possession of the Dispatch Publishing Company and sustained by a publication.

And your orator further states that the trustee and mortgagees and the complainant herein were induced to permit the consolidation of the two properties and the incidental confusion of said good wills and property acquired by said Dispatch Publishing Company by the representations aforesaid, expressed or implied, from the conduct and silence of the defendant.

Your orator further avers that the Dispatch Publishing Company, after having thus induced the trustee and mortgagees and this complainant to permit the consolidation, changes, and substitutions, and after having removed the place of publication, and after dispersing, alienating, or using up said mortgaged machinery, presses, type, and office furniture, did on the first day of December, 1879, when said debt matured, refuse to pay said principal note (and refused to sur-
render to said trustee or the mortgagors herein the good will
18 or the other mortgaged property or the name "Dispatch").

Your orator further avers that for the reason that the good will and other property of the mortgagors was confused and intermingled as aforesaid with the property of Dispatch Publishing Company so as to be incapable of separation or of distinction therefrom the property of said Dispatch Publishing Company, including

its good will sustained by the publication issued in connection therewith, and appurtenant property, presses, type, machinery, etc., and the membership in the said Western Associated Press are and ought to be in equity charged with the lien of said mortgage debt and to be sold for the satisfaction of the same.

III.

Your orator further states that at the time of the acquisition of said mortgaged good will, etc., the Dispatch Publishing Company agreed and assumed to pay said mortgage debt.

IV.

Your orator avers that a membership in the Western Associated Press is always represented by a certificate of a share of stock therein, and that under the by-laws and the constitution of said Western Associated Press said membership is tenable and vendable only in connection with the publication of a newspaper or periodical and in the manner laid down in the said constitution and by-laws, which are herewith filed and made a part of this complaint and marked Exhibits "F & G."

Your orator avers that at the time of the execution of said deed of trust in the nature of a mortgage the mortgagor, The St. Louis Dispatch Company, was then owner on the books of the Western Associated Press of a membership or share, represented by certificate No. 38, included in the description in said deed of trust by
19 the words "any and all shares by it owned in said Western Associated Press," and transferred as hereinbefore set out for the purpose only of said deed of trust.

Your orator avers that the purpose and object of said transfer of said certificate 38 (no transfer at that date on the books being contemplated) was simply and solely to enable the trustee in said mortgage, on the failure of the conditions therein recited, upon entering into possession of said newspaper or good will of the St. Louis Dispatch Company, as therein provided for, to have said share transferred to said trustee on the books of said association, or to the purchaser of the property in said deed of trust recited, at the foreclosure sale, agreeably to the regulations contained in the articles of incorporation and the constitution and by-laws of said Western Associated Press; that no legal title passed to the trustee by said deed to the membership in said association, and only a conditional title to the certificate No. 38 representing said membership, and said title to said certificate would not, under the regulations aforesaid contained in said by-laws, etc., become fully vested in said trustee until and after he should have acquired possession of said good will or publication; and your orator further avers that under the by-laws and articles of incorporation aforesaid the legal title to said certificate of membership aforesaid could never have fully vested in any individual, firm, or corporation until and after said individual, firm, and corporation should have become the purchaser of the good will and property of said St. Louis Dispatch Company and as successors

in right and liability to said company, and if after any sale, whether of foreclosure or otherwise, the purchaser of said property did not continue a publication in connection therewith the said membership would become lifeless and valueless, because a publication in connection with it was and is necessary to the sustenance of its life and value; that the said trustee and complainant herein have no rights in respect to said membership except under said deed of trust, and can acquire no title thereto until a sale of the good will of the said St. Louis Dispatch Company now in possession of the defendant Dispatch Publishing Company, at which time the title intended to be conveyed to the complainant herein by said deed of trust would be affectuated to the purchaser of the good will and property of said St. Louis Dispatch Company.

Your orator avers that on or about the — day of ——, 18—, one year after the Dispatch Publishing Company had been in the daily use and enjoyment of the membership then and for many years prior thereto standing on the books of the Western Associated Press in the name of St. Louis Dispatch Company, and represented by certificate No. 38, the Dispatch Publishing Company applied to said association for issuance to it, as the purchaser of the St. Louis Dispatch Company's newspaper and all appurtenant property and as the successor in right and liability to the St. Louis Dispatch Company, of a new certificate and to have its name placed upon the books of said association as a member in succession and right to the said St. Louis Dispatch Company and as the purchaser of the said St. Louis Dispatch Company's good will and appurtenant property; that the Western Associated Press did issue to defendant Dispatch Publishing Company a new certificate representing the membership in the name of the St. Louis Dispatch Company, and did place the name of the Dispatch Publishing Company upon its books as a member in virtue and in virtue only of the right acquired by said Dispatch Publishing Company as a successor to said St. Louis Dispatch Company and as a purchaser of the St. Louis Dispatch Company's newspaper, and succeeding to that company's right to hold the same, subject to the same liabilities and conditions as attached to said membership in the hands and in the name of the St. Louis Dispatch Company.

That the membership represented by certificate 64 is and was at all time aforesaid the same membership as that represented by certificate 38.

Your orator avers that the defendant Dispatch Publishing Company acknowledged the title to said St. Louis Dispatch Company's grantees by using and continuing to use for the period of one year the membership standing in the name of the St. Louis Dispatch Company, and without applying for a new certificate or to have its name placed upon the books of the Western Associated Press as the successor of the Dispatch Publishing Company or the purchaser of the latter company's good will.

That at the time the Dispatch Publishing Company came into possession of St. Louis Dispatch Company's good will it undertook and did publish a newspaper in connection with said membership,

into the use and control in which it so came into the possession as purchaser subject to the said first mortgage and as successor to said St. Louis Dispatch Company; that having thus come into the possession of said membership, subject to said first mortgage, it did, as hereinbefore stated, continue to receive the dispatches and news furnished by said association in virtue of that membership, then represented by certificate 38 and then standing on the books of the association in the name of the St. Louis Dispatch Company, and said defendant, Dispatch Publishing Company, likewise paid and continued to pay the assessment upon the said membership and have never ceased to pay it.

That at the time of its so entering into possession of said St. Louis Dispatch newspaper, its good will and other properties, the defendant, having likewise acquired the "Evening Post,"
22 has published a newspaper known as the Post and Dispatch, being the consolidation hereinbefore referred to.

That said Evening Post and the said John A. Dillon, publisher thereof, prior to the consolidation of said Post and Dispatch had no membership nor the use of any membership in said Western Associated Press.

Your orator further avers that the defendant Dispatch Publishing Company is estopped from denying that said membership in the Western Associated Press, used and maintained by it, is not the same membership as that recited in said first mortgage by its conduct in respect to the same, as hereinbefore set out.

Your orator further avers that the defendant Dispatch Publishing Company has now in its possession and under its control the good will, consisting of the advertising patronage and the circulation of said St. Louis Dispatch Company, its membership in the Western Associated Press, and all its machinery, press-, type, furniture, paper, tools, and forms, its rights and privileges and property or substitutions therefor. To the end, therefor-, that the said defendants may answer the several matters and things as fully and particularly as if they were herein again specially interrogated, and that the good will and other property or substitutions for the other property of the St. Louis Dispatch Company sold to and in the control of the said Dispatch Publishing Company, including membership in the Western Associated Press, consisting more particularly of the machinery, presses, type, cases, office furniture and fixtures, paper, forms, and tools and other material used in *the* connection with the operation of its business by the Dispatch Publishing Company and in connection with the publication of its newspaper, may by this honorable court be decreed to be sold for the payment of your orator's claim, with interest at the rate of
23 9% per annum from the first day of October, 1879—

That the Dispatch Publishing Company be decreed to pay to your orator the sum of $15,000 and the interest thereon, as just recited, and that your orator may have such other and further relief in the premises as the nature of its case may require and to your honor may seem meet:

V.

May it please your honors to grant unto your orator the writ of subpœna of the United States of America, to be directed to the St. Louis Dispatch Company and the said Dispatch Publishing Company and the said trustee, Henry L. Sutton, and the rest of the confederates when discovered, whereby commanding them and every one of them, at a certain day and under a certain pain therein to be specified, personally to appear before your honors in this honorable court, then and there to answer all and singular the premises and to show cause, if any they have, why such a decree should not be made, and so stand to, do, and perform and abide — such order and decree therein as to your honors shall seem meet; and your orator shall ever pray.

JOHN M. DICKSON,
Solicitor for Complainant.

EXHIBIT A.

This deed made and entered into this first day of June, A. D. 1877, by and between the St. Louis Dispatch Company of St. Louis, Missouri, party of the first part, Henry L. Sutton, trustee, party of the second part, and Frank J. Bowman, of the same place, party of the third part, witnesseth:

That the said party of the first part, in consideration of the debt and trust hereinafter mentioned and created, and the sum
24 of one dollar to it paid by the said party of the second part, the receipt of which is hereby acknowledged, do by these presents, grant, bargain and sell, convey and confirm, unto the said party of the second part, the machinery, type, presses, cases, furniture, paper and forms and tools, together with the good will of said St. Louis Dispatch Company, and its franchises of every kind and description, rights and privileges, and property including its interest in the "Western Associated Press," and any and all shares by it owned in said "Western Associated Press" as also all accounts and choses in action, or other valuable things by it, the said St. Louis Dispatch Company owned, or to it belonging, wherever situated; also all other property of every nature and character, which said party of the first part may acquire during the existence of this deed of trust. The said machinery, type, presses, cases, furniture, above described, being now situated at number 303 and 305 North Third street in the city of St. Louis in the State of Missouri, and the leasehold interest in said premises, now occupied by the said St. Louis Dispatch Company, at the place aforesaid are hereby transferred and set over unto the said party of the second part.

To have and to hold the same, and all the above-mentioned properties, privileges and franchises, with the appurtenances and privileges thereto belonging, to the said party of the second part, and to his successor hereinafter designated, and to the assigns of him and his successor forever.

In trust however, for the following purpose:

Whereas, the said St. Louis Dispatch Company is justly indebted

to said party of the third part, in the sum of fifteen thousand dollars, and has executed and delivered to the said party of the third part its certain promissory note of even date herewith, for
25 the sum of fifteen thousand dollars, payable two years and six months after date, to the order of Frank J. Bowman, with interest from date, at the rate of nine (9) per cent. per annum, payable at Exchange bank in the city of St. Louis, Missouri, interest payable as follows: one and one-half (1½) per cent. on the first day of August, and a like amount on the first day of October, December, February, April and June in each year until the payment of said principal sum. (Said above-described note being given in consideration for, and in payment of the principal and interest due on two certain promissory notes, heretofore given by said party of the first part, the first of said notes for ten thousand dollars, payable one year after date to the order of the Butchers' and Drovers' Bank of St. Louis, Missouri, with interest from date at the rate of ten per cent. per annum, and secured by deed of trust, executed October 2d, 1876, by the said St. Louis Dispatch Company and recorded in Book 529, page 308, in the recorder's office at St. Louis, Missouri. And the second of said notes for the principal sum of four thousand dollars, made and executed by the said St. Louis Dispatch Company on the 23d day of December, 1876, payable to the order of Frank J. Bowman, with interest thereon at the rate of eight per cent. per annum, secured by deed of trust on the property of said St. Louis Dispatch Company, executed on the 23d day of December, 1876, and recorded in Book 560, page 904, in the recorder's office of St. Louis, Missouri.) And the said party of the first part does hereby covenant and agree that it will cause to be insured for the benefit of the third party hereto, all its property, hereby conveyed in good and reliable insurance companies, to the amount of fifteen thousand dollars, and pay all premiums therefor, and has also agreed with said party of the third part, his indorsers, and assigns, to cause all taxes and assessments, general and special, to be paid, whenever due and payable, and if said agree-
26 ments relative to insurance and taxes be not performed by the party of the first part, as aforesaid, then said party of the third part or his assigns may pay such taxes and cause such insurance to be made, and if said party of the third part or his assigns elect so to do, then repayment for all moneys so paid for insurance and taxes and interest thereon from the time of payment at the rate of nine (9) per cent. per annum, these presents shall be a security in like manner and effect as for the payment of said note and interest.

Now, if said note for fifteen thousand dollars, be paid, when it becomes due and payable, and each instalment of interest be made when due and payable as above designated on the first days of August, October, December, February, April and June, and said agreement concerning the payment of taxes, aforesaid, and said agreement concerning insurance be each and all faithfully performed as aforesaid, then this deed shall be void, and the property hereinbefore conveyed shall be released at the cost of the said party of

the first part. But, if default be made in the payment of said note, or any or either of said payments of interests when due and payable, or in the faithful performance of said agreement of paying taxes as aforesaid, or of insuring as aforesaid, then this deed shall remain in full force and effect, and the said party of the second part in case of his death, inability or refusal to act, or absence from the city of St. Louis, when authorized to sell under these presents and a sale be desired by the holder of said note, the sheriff of St. Louis (who shall thereupon become his successor to the title of said property, and the same become vested in him in trust, for the purposes and objects of these presents, and with all the powers, duties and obligations thereof) may proceed to sell the property hereinbefore described, or any part thereof at public vendue to the highest
27 bidder at the east front door of the court-house in said city of St. Louis, for cash, first giving fifteen days public notice of the time, terms and place of said sale, and of the property to be sold by advertisement in some English newspaper, printed and published in said city of St. Louis, though any sale, when once duly advertised, may be adjourned without other notice, than oral proclamation made at the time and place advertised, and any sale so advertised as aforesaid may be again adjourned from time to time by oral proclamation made at the place advertised, and at the time at which the last-adjourned sale was to have taken place; and it shall not be necessary that said trustee or sheriff shall have said property upon, or at the place of sale; and upon such sale so advertised, or advertised and adjourned, shall execute and deliver a deed in fee simple of the property sold to the purchaser or purchasers thereof, a recital wherein of the giving of such notice, and in case said trustee or sheriff shall sell, of the happening of any or either of the aforesaid events, making him successor herein as aforesaid shall be proof thereof; and receive the proceeds of said sale out of which he shall pay, first, the costs and expenses of executing this trust, including compensation to the trustee for his services, and next to the payor thereof, upon the usual voucher therefor, all moneys paid for taxes or insurance as hereinbefore provided for, when not paid as hereinbefore agreed and interest thereon at the rate of ten per cent. per annum, from the times of their payments, and next the note aforesaid. For upon failure to pay any instalment of interest when due, the principal sum shall become due and payable anything in the face of the note notwithstanding, and the balance of said proceeds, if any, shall be paid to the said party of the first part, or its legal representatives. The trustee may act by agent or
28 attorney in the execution of this trust. And the said party of the second part covenants faithfully to perform and fulfill the trust herein created.

In witness whereof the said party of the third part by its president and secretary executed this instrument and affixed thereto the seal of said corporation, this deed being so executed pursuant to a resolution of the stockholders of said St. Louis Dispatch Company passed on the thirty-first day of May, A. D. 1877 and of a resolution

of the board of directors of said St. Louis Dispatch Company passed on the same date. Done in St. Louis, Missouri this first day of June, A. D. 1877.

[Seal St. Louis Dispatch Co.]

ST. LOUIS DISPATCH CO.,
By W. R. ALLISON, *Pres.*
Attest: E. W. FOX,
Secretary St. Louis Dispatch Co.

STATE OF MISSOURI, } ss:
City of St. Louis, }

Be it remembered that on the first (1st) day of June, A. D. 1877, before me, the undersigned, notary public in and for said city and State, duly commissioned and qualified, came W. R. Allison, president, and E. W. Fox, secretary, of St. Louis Dispatch Company, both of whom are personally known to me to be the same persons whose names are subscribed to the foregoing instrument of writing as parties thereto, and have as the respective officers of the St. Louis Dispatch Company, as president and secretary, respectively acknowledged the same to be their act and deed and the deed of said company, by and through them, for the purposes therein mentioned.

In testimony whereof I have hereunto set my hand and official seal.

[SEAL.] BERNARD DIERKES,
Notary Public.

Qualified Nov. 12th, 1875.
My term expires Nov. 9th, 1881.

29 STATE OF MISSOURI, } ss:
City of St. Louis, }

I, the undersigned, recorder of deeds, certify that the foregoing instrument of writing was filed for record in my office June 2d, 1877, @ 1.37 p. m., and is truly recorded in Book 572, page 314.

Witness my hand and official seal — date aforesaid.

D. H. McADAM, *Recorder.*

Endorsed: "St. Louis Dispatch Co. to Frank J. Bowman, tr. Filed June 2d, 1877, 1.37 p. m. D. H. McAdam, recorder. 572, 314."

EXHIBIT B.

No. 38.

Western Associated Press. One share.

This is to certify that the Dispatch Company of St. Louis, Mo., is entitled to one share, of the value of ten dollars, in the capital stock of the Western Associated Press, an association organized under and by virtue of an act of the legislature of the State of Michigan entitled "An act to provide for the incorporation of associations

engaged in the publication of newspapers, periodicals, books, and other matter," approved March 21, 1865. The shares of said stock are transferable only on the books of said association and are subject to the conditions of articles II, XII, XIII, XIV, and XVI of the revised by-laws of said association, adopted at the annual meeting held at Detroit November 18, 1874, which are as follows:

II. The evidence of membership shall consist of a certificate of one share of the capital stock of the association, which certifi-
30 cate shall be transferable only on the books of the association as hereinafter provided. XII. Any member selling or transferring his newspaper may transfer his certificate of stock to the purchaser or successor in the ownership of such newspaper, and it shall be the duty of the secretary, upon request, to transfer the same on the books of the association to such purchaser or successor, who shall then sign the articles of association and by-laws and become a member with the same rights and privileges as the original member. If any member shall discontinue the publication of a newspaper or shall sell his newspaper to another member, his membership shall cease and his certificate of stock shall be cancelled on the books of the association and the treasurer shall refund to him the money paid to the association for the same. XIII. Members may withdraw at any time by notifying the president, paying all their assessments, and surrendering their certificate of stock to the association. The stock of any member so withdrawing shall be cancelled. Any member may be suspended by the board of directors or may forfeit his stock for violating the by-laws or for any other act injurious to the best interests of this association. No member shall furnish the news of this association in advance of publication to any person who is not a member, nor furnish local or special news to any newspaper or combination of newspapers not having a membership in this or in any associated press organization with which this association has business relations. For any wilful violation of this provision it shall be the duty of the board of directors to suspend the member so offending from receiving the news dispatches of this association and to report the facts to the association at the first regular or special meeting: Provided, however, that no such suspension shall be made without a two-thirds vote of the board after due notice of the cause of complaint and opportunity to the member in default or complained of to be heard,
31 the place for such hearing to be at the office of the general agent. XIV. The board of directors shall have power to make assessments upon the members to defray the expenses incurred in collecting and transmitting intelligence and for other purposes not inconsistent with the charter and by-laws, and the board may discontinue the use of the news so collected to any member failing to pay promptly his assessment. Any member to whom the use of the news has been so discontinued may be readmitted to the use of the same within six months of the time of such discontinuance upon his refunding to the other members of the association in the same city or town such increased assessment as they may have paid in consequence of said discontinuance. XVI. Each member

shall be authorized to publish the telegraphic news of this association in one newspaper only and in one language only, which language shall be specified in the certificate of stock. Members publishing morning editions only shall not be allowed to receive and publish the day reports of this association in an evening edition, nor shall those publishing evening editions only be allowed to receive and publish the night reports in morning editions, except with the unanimous consent of the members in the town or city where the newspapers of the said members are published: Provided, however, that members who are now publishing both morning and evening editions and receiving the telegraphic news of this association therefor may continue to receive the same. For any violation of the provisions of this by-law the board of directors may discontinue the dispatches to the member so offending.

In witness whereof the said association has caused this certificate to be signed by their president and secretary and the common seal of said association to be affixed hereunto.

Dated this twentieth day of January, A. D. 1876.

M. HALSTEAD, *President.*

H. E. BAKER, *Secretary.*

32 Endorsed: "The within certificate of stock is hereby assigned and transferred to Henry L. Sutton, trustee, in deed of trust bearing date June 1st, 1877, for like purpose as other property therein named is transferred, being the certificate of stock in the Western Associated Press therein referred to. W. R. Allison, pres., for St. Louis Dispatch Co. Attest: E. W. Fox, sec'y."

EXHIBIT C.

$15,000. ST. LOUIS, *June 1st*, 1877.

Two years and six months after date the St. Louis Dispatch Company promises to pay to Frank J. Bowman or his order fifteen thousand dollars, for value received, negotiable and payable without defalcation or discount, with interest from date at the rate of nine per cent. per annum, payable 1½ per cent. on the first days of August, October, December, February, April, and June, principal and interest payable at Exchange bank, in the city of St. Louis, Mo.

ST. LOUIS DISPATCH CO.,
By W. R. ALLISON, *President.*

Attest: E. W. FOX,
Sec'te Dispatch Co.

Endorsed: "St. Louis Dis. Co. June 1, 4, '79. $15,000. Frank J. Bowman. Interest paid to Oct. 1st, 1878."

33 EXHIBIT D.

OFFICE OF THE RECORDER OF DEEDS, ST. LOUIS, MO.

Whereas on the sixteenth day of January, 1878, at a general meeting of the stockholders of the Saint Louis Dispatch Company,

a corporation duly organized and existing under the general corporation laws of the State of Missouri, held pursuant to the order of the board of directors, and at which meeting four hundred and forty shares out of the entire stock of four hundred and sixty shares were represented and voting, a resolution was adopted by the unanimous vote of all the stock represented at said meeting, which resolution was in words and figures following, to wit:

Resolved by the stockholders of the St. Louis Dispatch Co., That the president be, and hereby is, authorized and directed to effect a purchase from the Wolcott-Hume Company, a corporation organized and existing under the laws of the State of Missouri, now engaged in the publication of "The St. Louis Journal," the property, assets, effects, franchises, credits, and good will of said Wolcott & Hume Co., upon the terms and in the manner following, viz: The president is authorized and directed to execute and issue the bonds of the Saint Louis Dispatch Company for the aggregate amount of thirty thousand dollars ($30,000.00), of such denominations as shall seem to him most expedient. To secure said bonds the president is authorized and directed to execute and deliver a deed of trust on behalf and in the name of the St. Louis Dispatch Company on all the property, assets, and effects of said Wolcott & Hume Company so to be acquired and on all the property, franchises, and assets, credits, and good will of the St. Louis Dispatch Company, subject to a deed of trust heretofore executed by said St. Louis Dispatch Company to secure an indebtedness of fifteen
34 thousand dollars, executed about June, 1877. Said bonds shall be dated the twentieth day of January, 1878, and be due and payable five years from date or sooner, at the option of the Dispatch Company, upon thirty days' notice given to the holder of any such bond or bonds and shall bear interest at the rate of eight per cent. per annum, payable semi-annually. Of these bonds when so executed, and when said deed of trust shall have been duly executed and delivered, and upon the execution and delivery by said Wolcott & Hume Company of a good and sufficient bill of sale or conveyance of all the said assets, credits, effects, franchises, and property hereinbefore authorized to be purchased to said St. Louis Dispatch Company free of all mortgage, encumbrance, or lien or adverse title of any sort or description, the president shall deliver to said Wolcott & Hume Co. in full payment for all the property so acquired, as hereinbefore recited, from them nine thousand dollars ($9,000) of said bonds, and the remainder of said bonds or the proceeds thereof or so much thereof as shall be necessary shall be appropriated to the liquidation of the flo*a*ing indebtedness of said St. Louis Dispatch Company and said Wolcott & Hume Company; and whereas, in pursuance of said resolution, said St. Louis Dispatch Company, by its president, has executed its ninety bonds, numbered — one (1) to ninety (90), both inclusive, for the aggregate amount of thirty thousand dollars, said bonds numbered from one to fifty, inclusive, being for the sum of one hundred dollars each, and said bonds numbered from fifty-one to eighty, inclusive, being for the sum of five hundred dollars each, and said bonds numbered from eighty-one to ninety,

inclusive, being for the sum of one thousand dollars each, and which said bonds are in the following form, to wit:

Mortgage Bond. Interest, Eight Per Cent.

35 "St. Louis Dispatch Co."

No. —. $—.

Know all men by these presents the St. Louis Dispatch Company of St. Louis, Missouri, a corporation duly organized and existing under the general laws of the State of Missouri in relation to manufacturing and business companies, is indebted to — or bearer in the sum of one hundred dollars, lawful money of the United States of America, which sum the said St. Louis Dispatch Company for value received hereby promises to pay to said — or the bearer hereof at its office in the city of St. Louis, Missouri on the twentieth day of January, A. D. 1883 with interest thereon from date at the rate of eight per cent. per annum payable semi-annually on the twentieth days of July and January, of each year at its office on the presentation and surrender of the annexed interest coupons as they severally become due and payable as expressed on their face. This bond is one of a series of ninety bonds issued by said company bearing the same date and numbered from one to ninety inclusive, said bonds numbered from one to fifty inclusive, being for the sum of one hundred dollars each, said bonds numbered from fifty-one to eighty, both inclusive, being for the sum of five hundred dollars each, and said bonds numbered from eighty-one to ninety, both inclusive, being for the sum of one thousand dollars each, and all of said bonds aggregating the sum of thirty thousand dollars. The payments of said bonds and coupons is secured by a deed of trust which is a first incumbrance on all the rights, credits, effects, good will and property of whatever sort or description heretofore owned by the Wolcott & Hume Company, a corporation organized under the said general corporation laws of the State of Missouri and by said Wolcott & Hume Company conveyed and transferred unto the said St. Louis Dispatch Company by a deed
36 of transfer dated the eighteenth day of January, 1878 and recorded in the recorder's office in the said city of St. Louis and which deed of trust is also a lien or incumbrance upon all the assets, rights, franchises, good will and property of whatever sort or description now owned by said St. Louis Dispatch Company (in addition to that acquired of the Wolcott & Hume Company as aforesaid) on which may hereafter be acquired, prior to the payment of said bonds, subject only to the incumbrance of a deed of trust dated the first day of June, 1877 executed by said St. Louis Dispatch Company to Henry L. Sutton as trustee to secure the payment of the sum of fifteen thousand dollars due and payable two years and six months from said last-named date with interest thereon at the rate of nine per cent. per annum. The said deed of trust securing this bond is duly recorded in the recorder's office in said city of St. Louis. It is however expressly stipulated as a condition of this bond, that should the said St. Louis Dispatch Company so elect, it may at any time,

a corporation duly organized and existing under the general corporation laws of the State of Missouri, held pursuant to the order of the board of directors, and at which meeting four hundred and forty shares out of the entire stock of four hundred and sixty shares were represented and voting, a resolution was adopted by the unanimous vote of all the stock represented at said meeting, which resolution was in words and figures following, to wit:

Resolved by the stockholders of the St. Louis Dispatch Co., That the president be, and hereby is, authorized and directed to effect a purchase from the Wolcott-Hume Company, a corporation organized and existing under the laws of the State of Missouri, now engaged in the publication of "The St. Louis Journal," the property, assets, effects, franchises, credits, and good will of said Wolcott & Hume Co., upon the terms and in the manner following, viz: The president is authorized and directed to execute and issue the bonds of the Saint Louis Dispatch Company for the aggregate amount of thirty thousand dollars ($30,000.00), of such denominations as shall seem to him most expedient. To secure said bonds the president is authorized and directed to execute and deliver a deed of trust on behalf and in the name of the St. Louis Dispatch Company on all the property, assets, and effects of said Wolcott & Hume Company so to be acquired and on all the property, franchises, and assets, credits, and good will of the St. Louis Dispatch Company, subject to a deed of trust heretofore executed by said St.

Louis Dispatch Company to secure an indebtedness of fifteen
34 thousand dollars, executed about June, 1877. Said bonds shall be dated the twentieth day of January, 1878, and be due and payable five years from date or sooner, at the option of the Dispatch Company, upon thirty days' notice given to the holder of any such bond or bonds and shall bear interest at the rate of eight per cent. per annum, payable semi-annually. Of these bonds when so executed, and when said deed of trust shall have been duly executed and delivered, and upon the execution and delivery by said Wolcott & Hume Company of a good and sufficient bill of sale or conveyance of all the said assets, credits, effects, franchises, and property hereinbefore authorized to be purchased to said St. Louis Dispatch Company free of all mortgage, encumbrance, or lien or adverse title of any sort or description, the president shall deliver to said Wolcott & Hume Co. in full payment for all the property so acquired, as hereinbefore recited, from them nine thousand dollars ($9,000) of said bonds, and the remainder of said bonds or the proceeds thereof or so much thereof as shall be necessary shall be appropriated to the liquidation of the flo*a*ing indebtedness of said St. Louis Dispatch Company and said Wolcott & Hume Company; and whereas, in pursuance of said resolution, said St. Louis Dispatch Company, by its president, has executed its ninety bonds, numbered — one (1) to ninety (90), both inclusive, for the aggregate amount of thirty thousand dollars, said bonds numbered from one to fifty, inclusive, being for the sum of one hundred dollars each, and said bonds numbered from fifty-one to eighty, inclusive, being for the sum of five hundred dollars each, and said bonds numbered from eighty-one to ninety,

inclusive, being for the sum of one thousand dollars each, and which said bonds are in the following form, to wit:

Mortgage Bond. Interest, Eight Per Cent.

35 "St. Louis Dispatch Co."

No. —. $—.

Know all men by these presents the St. Louis Dispatch Company of St. Louis, Missouri, a corporation duly organized and existing under the general laws of the State of Missouri in relation to manufacturing and business companies, is indebted to — or bearer in the sum of one hundred dollars, lawful money of the United States of America, which sum the said St. Louis Dispatch Company for value received hereby promises to pay to said — or the bearer hereof at its office in the city of St. Louis, Missouri on the twentieth day of January, A. D. 1883 with interest thereon from date at the rate of eight per cent. per annum payable semi-annually on the twentieth days of July and January, of each year at its office on the presentation and surrender of the annexed interest coupons as they severally become due and payable as expressed on their face. This bond is one of a series of ninety bonds issued by said company bearing the same date and numbered from one to ninety inclusive, said bonds numbered from one to fifty inclusive, being for the sum of one hundred dollars each, said bonds numbered from fifty-one to eighty, both inclusive, being for the sum of five hundred dollars each, and said bonds numbered from eighty-one to ninety, both inclusive, being for the sum of one thousand dollars each, and all of said bonds aggregating the sum of thirty thousand dollars. The payments of said bonds and coupons is secured by a deed of trust which is a first incumbrance on all the rights, credits, effects, good will and property of whatever sort or description heretofore owned by the Wolcott & Hume Company, a corporation organized under the said general corporation laws of the State of Missouri and by said Wolcott & Hume Company conveyed and transferred unto the said St. Louis Dispatch Company by a deed
36 of transfer dated the eighteenth day of January, 1878 and recorded in the recorder's office in the said city of St. Louis and which deed of trust is also a lien or incumbrance upon all the assets, rights, franchises, good will and property of whatever sort or description now owned by said St. Louis Dispatch Company (in addition to that acquired of the Wolcott & Hume Company as aforesaid) on which may hereafter be acquired, prior to the payment of said bonds, subject only to the incumbrance of a deed of trust dated the first day of June, 1877 executed by said St. Louis Dispatch Company to Henry L. Sutton as trustee to secure the payment of the sum of fifteen thousand dollars due and payable two years and six months from said last-named date with interest thereon at the rate of nine per cent. per annum. The said deed of trust securing this bond is duly recorded in the recorder's office in said city of St. Louis. It is however expressly stipulated as a condition of this bond, that should the said St. Louis Dispatch Company so elect, it may at any time,

upon giving to the holder of this bond, not less than thirty days' notice by advertisement in not less than two newspapers published in said city of St. Louis, cancel this bond by payment to the holder thereof, of the amount of principal and interest then due.

In testimony whereof the said St. Louis Dispatch Company has caused this bond to be signed by its president and attested by its secretary and its corporate seal to be hereto affixed in the city of Saint Louis this twenty-first day of January, A. D. one thousand eight hundred and seventy-eight.

W. R. ALLISON, *President.*

[SEAL OF COMPANY.]

Attest: E. W. FOX, *Secretary.*

It is hereby certified that this is one of ninety bonds, as above described, secured by the mortgage deed of trust herein referred to.

R. S. MACDONALD, *Trustee.*

37 And to each of which said bonds are attached ten interest coupons numbered to correspond with said bonds respectively, each coupon being for four per cent. of the face of the bond to which it is attached, being the semi-annual interest on such bond as the rate of eight per cent. per annum and payable on the twentieth days of July and January consecutively in each year till the maturity of said bond.

Now therefore this indenture made and entered into this — day of January, 1878, by and between the said St. Louis Dispatch Company party of the first part, and Robert S. MacDonald of the city of St. Louis in the State of Missouri party of the second part and the Wolcott & Hume Company, of the said city, and any and all other lawful holder or holders of said bonds or any of them parties of the third part witnesseth: That said party of the first part pursuant to said resolution hereinbefore recited, and in consideration of the sum of one dollar to it in hand paid by said party of the second part, the receipt whereof is hereby confessed and acknowledged, acting by its president, has granted, bargained, and sold, transferred, assigned and set over, and by these presents does grant, bargain and sell, transfer, assign and set over unto said party of the second part his heirs and assigns the following-described property to wit: First: All the property, effects, franchises, assets, credits, and effects of the Wolcott & Hume Company aforesaid acquired by an instrument of sale and conveyance dated the eighteenth day of January, 1878, to wit, all the property, fixtures, machinery, furniture, type and printing material including one two-feed Wharfdale printing press, one twelve-horse-power upright engine and boiler, one Gifford injector, one fifteen-horse-power engine, one Gardiner governor, set of pulleys shafting and belting for running the press, all the type used in printing newspapers consisting of about

one thousand pounds of brevier, about six hundred
38 pounds of nonpareil, about four hundred pounds mignon, one thousand pounds of display type, also all the stands, cases, imposing stones, chases, rules, galleys and all other material, utensils and implements used in the composition room of the said Wolcott & Hume Company, one McNeale and Urban safe No. 3738, one double office desk, six single desks, all files of the Daily and Weekly Journal, also all the franchises of said Wolcott & Hume Company, the good will and telegraphic franchises of said Daily and Weekly Journal, and any and all property of whatsoever kind or description belonging or in any way appertaining to, and connected with the printing office and newspapers of said Wolcott & Hume Company, with all the rights, accounts, credits, bills receivable and other assets of whatever sort or description in anywise appertaining or belonging to said Wolcott & Hume Company. Second: All the property, fixtures, machinery, furniture, type, printing material and personal property of whatever sort or description owned by said party of the first part in addition to that acquired of the Wolcott & Hume Company as aforesaid consisting in part of one four-cylinder Hoe printing press, one boiler and engine with all the appurten-ces thereto belonging with all the type chases, rules, galleys, imposing stones, cases and stands and office and other fixtures and furniture which was owned by said party of the first part prior to said purchase from said Wolcott & Hume Company, also one large safe made by Beard and Brother No. 7. The above-described property being the same which was heretofore situated in the building occupied by said party of the first part, known as numbers 303 and 305 North Third in said city of St. Louis. Also its interest in the Western Associated Press and any and all shares owned by it in said Western Associated Press with all rights, credits, bills receivable, choses in action, good will, assets, and property of whatever
sort or description of which said party of the first part was
39 possessed or owned or was in anywise entitled to before the purchase from said Wolcott & Hume Company aforesaid, said last-described property specified in the paragraph beginning with the word "second" being subject to a deed of trust heretofore executed by said party of the first part to Henry L. Sutton as trustee, dated June 1st, 1877, and recorded in the records in said recorder's office in Book 572 on page 314 to secure the sum of fifteen thousand dollars due January 1st, 1880 with the interest thereon, all the above-described property hereby conveyed being now situate in the building now occupied by said party of the first part known as number 111 North Fifth street in said city of St. Louis, and third: All the machinery, furniture, fixtures, type and personal property of whatever sort or description with the assets, choses in action, credits, franchises and good will which may hereafter be acquired by said party of the first part during the continuance of this trust. In trust however for the following purposes and on the following terms and conditions, viz: Whereas said party of the first part has executed the bonds and coupons hereinbefore specifically described, and whereas it is further provided and stipulated as a part of this con-

tract that said party of the first part shall cause all the personal property hereinbefore described, to be kept insured until the said bonds are fully satisfied and paid, in some solvent insurance company or companies to be approved by said party of the second part in the sum of five (5) thousand dollars, the policies to be assigned over and delivered to said party of the second part and held by him as security for the performance of the covenants of this deed, and it is also further stipulated and provided as a part of this contract that said party of the first part shall cause the taxes whether municipal, State or national which may lawfully become due and payable on any and all of said property,
40 to be well and truly paid when the same shall become due and payable, and it is also further stipulated that said party of the first part, shall pay or cause to be paid the interest and principal of the debt secured by the prior deed of trust executed by the said party of the first part on the first day of June, 1877, hereinbefore described, when the same shall become due and payable, and it is also further stipulated and provided as part of this contract that if said party of the first part shall fail to keep in force sufficient policies of insurance on said property as hereinbefore required, any holder or holders of any of said bonds may cause such policies to be obtained with the approval of said party of the second part, and assign over to him as security for the performance of the covenants of this deed, and may pay the proper cost and expense of such insurance, and if said party of the first part shall fail or neglect to pay any premium or premiums, assessments or charges lawfully made and necessary to be paid to keep said insurance in force, or shall fail or neglect to pay any such taxes lawfully chargeable against said property when the same shall become due and payable, or shall fail or neglect to pay any amount of interest or principal of the debt secured by said deed of trust of the first day of June, 1877, when the same shall become due and payable, then in case of any such default any lawful holder or holders of any such bond or bonds may on behalf of said party of the first part, cause such insurance premiums, assessments or charges or such taxes or such amount of said prior debt or interest as shall have become due and payable to be paid at his or their own proper cost and expense, and the amount of such cost or expense shall be held by the person so paying the same as an additional demand against said party of the first part, and shall be secured by this deed of trust to all intents and purposes as if the *the* same were a part
41 of said bonds, and shall bear interest from the date of such payment, at the rate of eight per cent. per annum till paid, and shall be due and payable to such person or persons on demand. Now therefore if the said party of the first part shall well and truly pay the said bonds and coupons when the same shall become due and payable according to their tenor and effect, and shall well and truly perform all its covenants and stipulations hereinbefore recited concerning insurance, taxes and the debt and interest secured by said prior deed of trust and shall pay to any holder or holders of any of said bonds any sum or sums of money by him or them paid

on account of such insurance, taxes or prior debt or interest when demanded, then, and in that event this deed shall be null and void, and shall be released at the cost and expense of the said party of the first part, but if said party of the first part shall not well and truly pay the said bonds and coupons when the same become due and payable according to their tenor and effect or shall fail to perform any of its covenants as hereinbefore recited concerning insurance, taxes or the said prior debt and interest or shall fail to pay the amount of cost or expenses advanced by the holder or holders of any bond or bonds as hereinbefore provided when demanded, then, and in either of said events all of said bonds shall at once become due and payable and this deed shall remain in full force and effect, and the said party of the second part or in case of his death absence from the city of St. Louis or inability or refusal to act, the sheriff then being of the city of St. Louis at the request of the holder or holders of any of said bonds shall proceed to sell the property of whatever sort or description herein conveyed, at public vendue to the highest bidder for cash at the east front door of the court-house in the said city of St. Louis, having first given twenty days' notice of the time, terms and place of
42 said sale and of the property to be sold by advertisement in at least two newspapers printed in the English language published in said city of St. Louis, and shall receive the proceeds of said sale, and out of the proceeds he shall pay first the costs and expenses of executing this trust including a reasonable compensation to said trustee for his services and next any sum or sums of money which have been paid out by the holder or holders of any of said bonds on account of insurance taxes or said prior indebtedness, with interest on such payment as hereinbefore provided and next he shall distribute the remainder among the lawful holders of said bonds and coupons then due, *pro rata* according to the amounts of such bonds and coupons held by them respectively, until the whole amount so due, shall be paid, and the remainder if any shall be paid over to the said party of the first part, its legal representatives or assigns.

In witness whereof said party of the first part has caused this deed to be signed by its president and secretary and the seal of said party of the first part affixed hereto.

ST. LOUIS DISPATCH CO.
[SEAL.] W. R. ALLISON, *President.*

Attest: E. W. FOX,
Secretary St. Louis Dispatch Co.

STATE OF MISSOURI, }
City of St. Louis. }

Be it remembered that on this second day of February, 1878, before me, the undersigned, a notary public in and for the said city and State, whose commission will expire on the sixth day of April, 1878, came W. R. Allison and E. W. Fox, who are personally known to me to be the same persons whose names are subscribed to the

foregoing instrument of writing, and acknowledged that they executed the same respectively as president and secretary of the said St. Louis Dispatch Company, and that said instrument is the act and deed of said corporation by themselves as such officers.

43 Witness my hand and notarial seal this second day of February, 1878.

Copy of seal:

[Henry M. Post, Notary Public, St. Louis County, Mo.]

HENRY M. POST,
Notary Public, St. Louis City & Co., Mo.

Filed and recorded Feb. 4th, 1878, @ 4.50 p. m.
D. H. MACADAM, *Recorder.*

NOTE.—The word "February," on lines 28 & 34 of page 71 of this record, is interlined in the original deed, and "June," on line 13 of page 69 of same, is written on an erasure.

STATE OF MISSOURI, } ss:
City of St. Louis, }

OFFICE OF RECORDER OF DEEDS.

I, the undersigned, recorder of deeds, certify that the foregoing is a true copy of an instrument in writing executed by St. Louis Dispatch Co. to Wolcott & Hume Co. *et als.*, tr., together with the acknowledgement and date of filing and recording thereof, as fully as the same remains of record in my office in Book P. P. No. 8, page 68.

Witness my hand and official seal this 5th day of February, 1880.

[SEAL.] C. W. IRWIN, *Recorder.*

Endorsed: "Certified copy. St. Louis Dispatch Co. to Wolcott & Hume Co. *et als.*, tr. Book P. P. No. 8, page 68. Office of recorder of deeds, St. Louis, February 5th, 1880."

44 EXHIBIT E.

Articles of Association of the Western Associated Press.

Know all men by these presents that we, the Western Associated Press, whose names are hereunto subscribed, do hereby associate ourselves together, according to the provisions of an act of the legislature of the State of Michigan entitled "An act to provide for the incorporation of associations engaged in the publication of newspapers, periodicals, books, and other matter," approved March 21, 1865, for the purpose of organizing a corporation under said act; and to that end we do no- adopt, declare, and sign the following articles of association, viz:

First. The name of this association shall be "The Western Associated Press."

Second. The capital stock of this association shall be one thousand dollars, divided into one hundred shares of ten dollars each.

Third. This association is established for the purpose of procuring

intelligence for the newspaper press from all parts of the world by telegraph.

Fourth. The place of business of this association shall be located in Detroit.

Fifth. The term for which this association is organized is thirty years.

In witness whereof we have hereunto set our hands and seals this twenty-third day of March, eighteen hundred and sixty-six.

W. S. GEORGE. [SEAL.]
J. E. SCRIPPS. [SEAL.]
JACOB BARNS. [SEAL.]

[Five-cent stamp, canceled.]

45 STATE OF MICHIGAN, } ss:
Office of the Secretary of State, }

I, Gilbert R. Osmun, secretary of state of the State of Michigan, do hereby certify that I have compared the annexed copy of articles of association of "The Western Associated Press" with the original filed in this office April 14th, 1866, and that it is a true and correct transcript therefrom and of the whole of such original.

In testimony whereof I have hereunto set my hand and affixed the great seal of the State of Michigan, at Lansing, this 29th day of June, in the year of our Lord one thousand eight hundred and eighty-seven.

G. K. OSMUN,
Secretary of State.

[SEAL.]

EXHIBIT- "F & G."

Revised By-Laws of the Western Associated Press.

I.—Membership.

Any proprietor of a daily newspaper who has heretofore signed the articles of this association and is now an active member of the same and his lawful assigns and any such person or firm or corporation within the territory of the Western Associated Press who shall hereafter be admitted in accordance with these by-laws shall be a member of this association: Provided that no new member shall be elected except upon the terms prescribed in article XV.

II.—Stock.

The evidence of membership shall consist of a certificate of one share of the capital stock of the association, which certificate shall be transferable only on the books of the association as hereinafter provided.

46 III.—Rights and privileges.

Membership of this association shall entitle each person, firm, or corporation publishing a daile newspaper as aforesaid to receive, at the places of publication designated by their signatures to the articles

of association (and not elsewhere), and to publish in their respective journals the telegraphic news collected by the association, upon payment of the assessments hereinafter provided.

IV.—Officers.

The officers of this association shall consist of a president, a vice-president, a secretary, a treasurer, a general agent, and a board of seven directors. The board of directors shall be elected by the association at its annual meeting and shall hold their offices for the term of one year and until their successors are elected. All other officers shall be elected by the board of directors & shall hold their offices for one year and until their successors are elected and qualified. The offices of treasurer and general agent may be held by the same person if the board of directors shall so elect, and the treasurer shall give a bond for the faithful discharge of his duties in such sum as the board of directors may from time to time require.

V.—President.

The president shall be *ex officio* a member of the board of directors and shall preside at all meetings of the association & of the board. He shall execute all contracts entered into by the board of directors. In case of his absence or inability his duties shall be performed by the vice-president. In case of the absence of both president and vice-president the board of directors may designate one of their own number to perform the duties of the president.

47 VI.—Secretary.

The secretary shall keep the books and records of the association and shall duly enter therein all proceedings of the association and of the board of directors and shall exhibit the same to any member upon his request. He shall receive such salary for his services as may be determined by the board of directors.

VII.—Treasurer.

The treasurer shall receive and safely keep and disburse, under the direction of the executive committee, moneys belonging to the association and shall keep a true and faithful account of his receipts and disbursements. His books shall be open at all times to the inspection of the board of directors or any member of the association. He shall receive such compensation for his services as may be determined by the board of directors.

VIII.—General agent.

The general — shall have charge of the collection and transmission of the news of the association, subject to the orders of the board of directors of the executive committee. He shall receive such compensation as may be fixed by the board of directors.

IX.—Board of directors.

The board of directors shall have power to make contracts, to employ and discharge officers and agents, to call the annual meetings, to make assessments upon members, and to expend the money of the association for its lawful purposes and to do all acts not inconsistent with the act of incorporation and the by-laws which they may deem for the best interests of the association. They may appoint an executive committee of not less than three of their own members, who shall have the same power as the board ex-
48 cept as to the trial of members, as provided in article XIII. They may appoint an auditing committee of not less than two persons, not members of the board, to examine the accounts of the treasurer. They may, by resolution, appoint other committees for special purposes, designating their duties and powers in the resolution of appointment. They shall make a report of all their doings, including a statement of receipts and expenditures, at each annual meeting of the association. They shall have power to adopt a corporate seal and alter the same at their pleasure.

X.—Meetings.

The regular meetings of this association shall be held at least once in each year at such time and place as may be designated by the board of directors, of which thirty days' notice shall be given by the secretary to each member of the association by mailing a copy of such notice to his address.

Special meetings of the association shall be called by the president on the order of the board of directors or upon the written request of ten of the members, in which case the notices shall state the object of said meeting and be served in the same manner as those of regular meetings.

XI.—Votes.

At all meetings of the association each member shall be entitled to one vote, which he may cast in person or by proxy. All proxies shall be delivered to the secretary and placed on file. Any firm or corporation being a member of this association may cast its vote by any person appointed by such firm or corporation. Before any vote shall be taken it shall be the duty of the secretary to make a true list of the members present, designating those represented in person and those represented by proxy, and when a division is demanded by one-fifth of the members present he shall call the roll and enter the votes at large on the journal of the association. A ma-
49 jority of the votes cast shall be necessary to elect the directors of the association. Votes may be cast either by ballot or *viva voce*, as may be determined by the members present.

XII.—Transfers.

Any member selling or transferring his newspaper may transfer his certificate of stock to the purchaser or successor in the owner-

ship of such newspaper, and it shall be the duty of the secretary, upon request, to transfer the same on the books of the association to such purchaser or successor, who shall then sign the articles of association and by-laws and become a member, with the same rights and privileges as the original member. If any member shall discontinue the publication of a newspaper or shall sell his newspaper to another member, his membership shall cease, and his certificate of stock shall be cancelled on the books of the association, and the treasurer shall refund to him the money paid to the association for the same.

XIII.—Withdrawal and expulsion.

Members may withdraw at any time by notifying the president, paying all their assessments, and surrendering their certificate of stock to the association. The stock of any member so withdrawing shall be cancelled. Any member may be suspended by the board of directors or may forfeit his stock for violating the by-laws or for any other act injurious to the best interests of this association. No member shall furnish the news of this association in advance of publication to any person who is not a member, nor furnish local or special news to any newspaper or combination of newspapers not having a membership in this or in any associated press organization with which this association has business relations. For any wilful violation of this provision it shall be the duty of the board of directors to suspend the member so offending from receiving the news dispatches of this association and to report the facts to the association at the first regular or special meeting: Provided, however, that no such suspension shall be made without a two-thirds vote of the board, after due notice of the cause of complaint and opportunity to the member in default or complained of, to be heard, the place of such hearing to be at the office of the general agent.

XIV.—Assessments.

The board of directors shall have power to make assessments upon the members to defray the expenses incurred in collecting and transmitting intelligence, and for other purposes not inconsistent with the charter and by-laws, and the board may discontinue the use of the news so collected to any member failing to pay promptly his assessment. Any member to whom the use of the news has been so discontinued may be re-admitted to the use of the same, within six months of the time of such discontinuance, upon his refunding to the other members of the association in the same city or town such increased assessment *at* as they may have paid in consequence of said discontinuance.

XV.—Admission of new members.

Applications for membership of this association shall be made in writing to the board of directors, and if a majority of said board shall vote for the admission of the applicant, he shall sign the arti-

cles of association and by-laws and pay into the treasury the sum of $10.00 and an additional amount equal to what would be his *pro rata* share in the property of the association. It shall then be the duty of the secretary to issue to him a certificate of one share of stock and to enroll his name in the list of members: Provided, that no new member shall be admitted without the unanimous consent of the members in the city or town where his business is carried on.

51 XVI.—General provisions.

Each member shall be authorized to publish the telegraphic news of this association in one newspaper only, and in one language only, which language shall be specified in the certificate of stock. Members publishing morning editions only shall not be allowed to receive and publish the day reports of this association in an evening edition, nor shall those publishing evening editions only be allowed to receive and publish the night reports in morning editions, except with the unanimous consent of the members in the town or city where the newspaper of said members are published: Provided, however, that members who are now publishing both morning and evening editions and receiving the telegraphic news of this association therefor may continue to receive the same. For any violation of the provisions of this by-law the board of directors may discontinue the dispatches to the member so offending.

XVII.—Signatures.

Each member shall sign the articles of association and the by-laws in force at the time of his admittance to membership.

XVIII.—Amendments.

Amendments may be made to the by-laws at any regular meeting or at any special meeting where thirty days notice has been previously given through the secretary of an intention to offer amendments and a copy thereof furnished. Each amendment shall be voted on separately by a call of the roll of members, and no amendment shall be adopted without the assent of a majority of all the members of the association.

XIX.—Construction.

The words "he," "his," "him," and "who," wherever occurring in these by-laws and referring to any member of this association, shall be understood to include any firm or corporation being such a member.

52 XX.—Repeal.

The foregoing by-laws are hereby declared to be adopted in lieu of those hitherto in force adopted by this corporation November 22, 1865, and November 6, 1867, and which are hereby repealed, except and provided, however, that nothing contained in any of the foregoing by-laws shall be held or construed to affect or impair any

right heretofore accrued to any person or corporation in virtue of anything contained in said by-laws adopted November 22, 1865, and November 6, 1867, nor to recognize in or confer upon any person or corporation the right to publish any news collected by or for this corporation in any journal in which the publication of such news prior to this date was unauthorized or prohibited by or in virtue of any provision contained in any by-law of this corporation adopted or acted on as such by the members thereof on or since November 22, 1865, or November 6, 1867.

And afterwards, to wit, on the twenty-second day of September, A. D. 1888, there was filed in said cause a demurrer in words and figures following, to wit:

(*Demurrer.*)

UNITED STATES OF AMERICA,
Eastern Division of the Eastern Judicial District of Missouri.

In the Circuit Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri.

53 METROPOLITAN NATIONAL BANK OF NEW YORK, Complainant,
vs.
THE ST. LOUIS DISPATCH COMPANY, DISPATCH Publishing Company, and Henry L. Sutton, Trustee, Defendants.
In Equity. No. 2883.

The demurrer of The Dispatch Publishing Company, one of the defendants herein, to the second amended bill of complaint of The Metropolitan National Bank of New York, complainant.

This defendant, by protestation, not confessing or acknowledging all or any of the matters and things in the said complainant's bill to be true in such manner and form as the same are therein set forth and alleged, doth demur thereto, and for cause of demurrer showeth:

I.

That the said complainant hath not in and by *his* said bill made or stated such a case as does or ought to entitle it to any such discovery or relief as is hereby sought and prayed for from or against this defendant.

II.

That the said complainant in and by its said bill claims to have a lien upon the "good will of the St. Louis Dispatch Company," averred to be owned and possessed by this defendant, and said amended bill does not show what said good will consists of and to what property, rights, or business it is incidental or appurtenant, and because said bill does not show of what said good will now consists as owned or possessed by this defendant, nor the value thereof, nor

to what property, circulation of newspapers, business advertisements or patronage it is inherent or incidental, and in
54 that there is nothing in all the averments of said complaint which enable this court to intelligibly, conscientiously, or reasonably ascertain and determin eof what said good will consists or how it can be made the subject-matter of a decree of foreclosure as prayed in said complaint; and in that said good will appears by this petition at this date to be entirely distinct and separate from the property and business to which the same belonged at the time the complainant acquired *his* rights under the first mortgage as set forth in the complaint; and in that said good will appears by the second amended complaint to have been so confused and commingled with the business and good will acquired by this defendant through its own efforts and as the result of its own legitimate business as to be inseparable therefrom and incapable of separation; and in that said good will, as appears by said complaint, was at the time this defendant received the same so intermingled and confused with the good will and business of the St. Louis Evening Post and the Evening Star as to be incapable of separation therefrom, and cannot therefore be made the subject of a decree or order of sale by this court at this time; and in that it appears by said bill that said so-called good will is so uncertain, intangible, and of such unknown properties, character, extent, and meaning as to be not the subject of a lien which a court of equity can reasonably and intelligibly enforce by decree of sale.

III.

And that it appears by the complainant's said bill that the Western Associated Press, a corporation organized and existing under the laws of the State of Michigan named in said bill, is a necessary party to the same, inasmuch as it is therein shown that no relief can be granted by way of foreclosure and sale of the certificate of membership in the Western Associated Press except by the
55 consent of said corporation or by having the rights and interests of said corporation settled and determined in this suit in advance of such decree; but the said complainant has not made the said Western Associated Press a party to the said amended bill.

IV.

And that it appears by the said amended bill that the same is exhibited by the complainant against this defendant and The St. Louis Dispatch Company and Henry L. Sutton, trustee, as defendants therein, for several distinct matters and causes, in many whereof, as appears by the said bill, this defendant is in no way interested, and by reason of such distinct matters the said bill is drawn out to a considerable length, and this defendant is compelled to take a copy of the whole thereof, and by joining distinct matters together, which do not depend upon each other, the proceedings in progress of the said cause will be intricate and prolix and this defendant put to unnecessary charges and expenses in matters which in no way relate to or concern it.

V.

And that, as appears by said amended bill of complaint, the cause of action set out as arising to the plaintiff on account of or by reason of the several allegations and complaint in said bill contained did not accrue within five years before the said bill was filed, whereby the complainant's cause of action as set forth in said bill is barred by the statute of limitations.

VI.

And that it appears by the allegations of said bill that ever since the month of January, 1879, this defendant has had, held, used, and enjoyed the certificate of membership claimed by it in the Western Associated Press and the good will of the St. Louis Dispatch Company without objection or protest from the complainant or
56 those under whom it claims; that during all that time it appears that the complainant and those under whom it claims have had full, ample, and open opportunity to have controverted defendant's claim as aforesaid, and to have asserted by its bill in equity or otherwise the lien and claim set out in the amended bill of complaint, and it further appears that notwithstanding the premises the plaintiff has suffered and allowed the defendant to hold said membership and good will and continue to enjoy the same at great expense to itself for the period of nearly nine years without objection or protest.

Wherefore the defendant says that by reason of the complainant's laches it ought in equity be barred and estopped from now asserting the pretended claim set out in the complaint.

VII.

That the complainant has not by *his* said amended bill shown such a case as entitles *him* to any such relief as is thereby prayed, inasmuch as it does not thereby appears that there was any impediment to an action at law being brought by the said complainant to ascertain *his* right and that of this defendant relative to the certificate of membership in the Western Associated Press and to the good will of the St. Louis Dispatch Company, or that in any trial or action verdict or judgment has been hitherto obtained by said complainant for that purpose, or that there was previously to or at the time the said bill was filed or now is any authentic record of such right.

Wherefore this defendant demands the judgment of this honorable court whether it shall be compelled to make any further or other answer to the said amended bill or any of the matters and things therein contained and prays to be hence dismissed with its reasonable costs in this behalf sustained.

DYER, LEE & ELLIS,
CHAS. & C. E. GIBSON,
Attorneys for Dispatch Publishing Company.

57 I, John P. Ellis, do hereby certify that I am one of the counsel for the defendant The Dispatch Publishing Company, which herewith presents the foregoing demurrer; that in my opinion the said demurrer is well founded upon law.

JOHN P. ELLIS.

UNITED STATES OF AMERICA, }
Eastern District of Missouri. }

STATE OF MISSOURI, }
City of St. Louis, } *ss:*

On this 22nd day of September, 1888, before me personally appeared Ignatz Kappner, who makes oath that he is secretary of The Dispatch Publishing Company (defendant), and that said demurrer is not interposed for the purpose of delay.

IG. KAPPNER,
Sec'ty Dispatch Pub. Co.

Subscribed and sworn to before me this September 22nd, 1888.
[SEAL.] ROB'T L. McLARAN,
Notary Public, City of St. Louis, Mo.

And afterwards, to wit, on the twenty-first day of November, A. D. 1888, the following, among other, proceedings were had and appear of record in said cause, to wit:

Demurrer Sustained.

METROPOLITAN NATIONAL BANK OF NEW YORK, Complainant, }
vs. } 2883.
ST. LOUIS DISPATCH CO. *et al.*, Defendants. }

Now come the parties, by their respective solicitors, and the court, having considered the demurrer of the defendant Dispatch Publishing Company to the amended bill of complaint herein,
58 finds the law thereon for said defendant, and orders that said demurrer be, and it is hereby, sustained.

And afterwards, to wit, on the twenty-sixth day of March, A. D. 1889, the following, among other, proceedings were had and appear of record in said cause, to wit:

Application to Withdraw Third Amended Bill Refused.

METROPOLITAN NATIONAL BANK OF NEW YORK, Complainant, }
vs. } 2883.
ST. LOUIS DISPATCH COMPANY *et al.*, Defendants. }

Now comes the complainant, by its solicitor, and makes application for leave to withdraw the third amended bill from the files, which is by the court refused.

Now also come the defendants and move for judgment on their

demurrer to the second amended bill, said demurrer having been heretofore sustained.

Thereupon it is ordered that said motion be, and the same is hereby, allowed.

Second Amended Bill Dismissed.

It is therefore now ordered, adjudged, and decreed by the court that the complainant's said second amended bill be, and the same is hereby, dismissed, and that defendants recover of the said complainant their costs herein, to be taxed.

Appeal Allowed.

And thereupon the complainant prays an appeal from the decree of this court to the Supreme Court of the United States, which is allowed upon complainant giving bond in the penal sum of five hundred dollars, to be approved by the court or one of the judges thereof.

And afterwards, to wit, on the nineteenth day of June, A. D. 1889, the following, among other, proceedings were had and appear· of record in said cause, to wit:

59 *Appeal Bond Approved.*

METROPOLITAN NATIONAL BANK, Complainant,
vs.
ST. LOUIS DISPATCH COMPANY *et al.*, Defendants. } 2883.

Now comes the complainant, by solicitor, and presents to the court its appeal bond in the penal sum of five hundred dollars; which bond is approved by the court and ordered to be filed and made part of the record herein.

Said appeal bond is in words and figures following, to wit:

60 Know all men by these presents that we, The Metropolitan National Bank, as principal, are held and firmly bound unto The St. Louis Dispatch Company, The Dispatch Publishing Company, and Henry L. Sutton, trustee, defendants, in the full and just sum of five hundred $\frac{00}{100}$ dollars, to be paid to the said defendants, heirs, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 18th day of June, in the year of our Lord one thousand eight hundred and eighty-nine.

Whereas lately, at the March term, 1889, of the circuit court of the United States for the eastern division of the eastern judicial district of Missouri, in a suit depending in said court between The Metropolitan National Bank, plaintiff, and The St. Louis Dispatch Company, The Dispatch Publishing Company, and Henry L. Sutton, trustee, defendant-, a decree was rendered against the said plaintiff, The Metropolitan National Bank, and the said plaintiff, The Metro-

politan National Bank, having obtained an appeal of the said court to reverse the decree in the aforesaid suit, and a citation directed to the said defendants, citing and admonishing them to be and appear at a Supreme Court of the United States to be holden at Washington the second Monday of October next:

Now, the condition of the above obligation is such that if the said The Metropolitan National Bank shall prosecute said appeal to effect and answer all damages and costs if it fail to make good its plea, then the above obligation to be void; else to remain in full force and virtue.

Sealed and delivered in presence of—

THE METROPOLITAN NATIONAL BANK, [SEAL.]
By JOHN M. DICKSON, *Att'y.*
JOHN M. DICKSON. [SEAL.]
—— ——. [SEAL.]

Approved by—
AMOS M. THAYER,
Dist. Judge.

[Endorsed:] No. 2883. United States circuit court, eastern division of the eastern judicial district of Missouri. The Metropolitan National Bank, complainant, *vs.* The St. Louis Dispatch Company, The Dispatch Publishing Company, and Henry L. Sutton, trustee, defendants. Bond, $500.00. Metropolitan National Bank, principal. John M. Dickson, surety. Filed 19th day of June, 1889. A. P. Selby, clerk.

61 In the Circuit Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri.

METROPOLITAN NATIONAL BANK OF NEW YORK, Complainant, *vs.* THE ST. LOUIS DISPATCH COMPANY *et als.*, Defendants. } In Equity. No. 2883.

John M. Dickson, solicitor for complainant; Dyer, Lee & Ellis, and Chas. & C. E. Gibson, solicitors for defendants.

Opinion of the Court.

On demurrer to the second amended bill filed April 21st, 1888. November 21st, 1888.

THAYER, *District Judge:*

This is a suit to foreclose a mortgage. The facts stated in the bill may be summarized as follows:

On June 1st, 1877, the St. Louis Dispatch Company was engaged in publishing a daily newspaper called the "St. Louis Dispatch," and on that day, being in need of money, it conveyed its "machinery, type, presses, cases, furniture, paper, forms, and tools, together with the good will of the St. Louis Dispatch Co. and its franchises of every

kind and description, rights, privileges, and property, including its interest in the Western Associated Press and any and all shares by it owned in the Western Associated Press," to Henry L. Sutton, as trustee, to secure the payment of its note for $15,000, that day executed in favor of F. J. Bowman and made payable 2½ years
62 after date, with interest at nine per cent. per annum; at the same time is assigned and delivered to Sutton the certificate for one share of stock which it owned in the Western Associated Press.

Subsequently the same property, together with much other property, was conveyed to a trustee in another and second mortgage or deed of trust to secure a further loan made by the St. Louis Dispatch Co. Under this second mortgage a foreclosure sale took place about a year prior to the maturity of the first mortgage. The sale so made was made subject to the lien of the first mortgage.

The purchaser under the second mortgage took possession of all of the property covered by the first and second mortgages, then in *esse*, and immediately consolidated the "St. Louis Dispatch" with another evening paper called the "Evening Post." A new corporation was formed under the name of the "Dispatch Publishing Co.," to continue the publication of the consolidated paper, which was thereafter called "The Post-Dispatch."

For some years after the consolidation the "Post-Dispatch" was published in the same building formerly occupied by the St. Louis Dispatch Co. The new corporation also enjoyed for some time all the privileges which accrued from the old company's membership in the Western Associated Press, but eventually the Associated Press issued to it a certificate of membership in lieu of that issued to the old company, although the old certificate was and still is in the hands of the trustee in the first mortgage, to whom it was pledged.

The new corporation (the Dispatch Publishing Co.) also paid the interest that accrued on the Bowman note for some ten months after the consolidation of the two newspapers. It refused to pay the note, however, when the same matured, on December 1st, 1879.

Thereupon the trustee in the first mortgage demanded of the
63 Dispatch Publishing Company all the property covered by the first mortgage, including the good will of the "St. Louis Dispatch Co.," but the demand was not complied with.

The bill avers that at the date of such demand, to wit, on December 1st, 1879, the Dispatch Publishing Company "had alienated, destroyed, or gradually used up all the machinery, type, presses, and property of a perishable nature of the said St. Louis Dispatch Co."

There are many other allegations in the bill, which is very prolix, but the foregoing are the principal averments by which the sufficiency of the pleading must be tested.

The relief prayed for is that the court will order a sale of the good will of the business described in the mortgage of June 1st, 1877, and the other property therein described or the property that has since been substituted therefor, including the membership in the Associated Press. Complainant is now the owner of the Bowman note.

1st. The first fact to be noted is that when the first mortgage ma-

tured all the tangible property covered by that mortgage had been alienated, worn out, or destroyed and was no longer in the possession of the purchaser under the second mortgage. Whatever tangible property (machinery, type, presses, &c.) was then in the hands of the Dispatch Publishing Company had been acquired by it subsequent to the purchase under the 2nd mortgage and the property so acquired was clearly not embraced by the terms of the first mortgage.

The bill shows that at the present time there is no property in the hands of the defendants on which a decree foreclosing the first mortgage can operate, unless it is the good will of the St. Louis Dispatch Company and the membership in the Associated Press.

64 Now, whilst the good will of a business is property that may be sold or mortgaged, yet it is property of a very peculiar and exceptional character. It is intangible property which in the nature of things can have no existence apart from a business of some sort that has been established and carried on at a particular place, and it cannot be sold by judicial decree or otherwise unless it be in connection with a sale of the business on which it depends.

Story on Partnership, sec. 99.
Robertson *vs.* Quidington, 28 Beavan, 529.
Pomeroy's Eq. Jur., sec. 1355 and notes.
Smith's Mercantile Law, page 188 and cases cited.

As the bill does not show that there is any established business (or any tangible property, for that matter,) which the court can order to be sold for the satisfaction of complainant's mortgage, it seems clear that it cannot decree a sale of the good will in question.

2nd. It is claimed by complainant's counsel that the lien of the mortgage of June 1, 1877, extends to the entire business and property of the Dispatch Publishing Company, including its good will, and that the court should so decree and enter an order of sale accordingly.

This contention is based on the ground that the Dispatch Publishing Company acquired the place of business of the St. Louis Dispatch Company and certain property, with the good will attached thereto, subject to the lien of the first mortgage, and that it subsequently paid interest for ten months on the note secured by the first mortgage, and eventually consolidated the property and good will so acquired with the good will and property of another newspaper.

I regard this position as untenable. The acts referred to,
65 neither singly nor collectively, operated to extend the mortgage lien over property not originally covered by the mortgage.

If any of the acts above recited amounted to an assumption of the mortgage debt by the purchaser under the second mortgage (as to which no opinion is expressed) the remedy is at law on such promise and not by bill to foreclose the mortgage.

So far as the tangible property covered by the first mortgage is concerned (that is to say, machinery, type, presses, &c.), the bill does not show that it was wrongfully commingled with other after-

acquired property, either by the mortgagor or purchaser under the second mortgage, so as to become undistinguishable. The allegation is that it was alienated or gradually worn out by use before the 1st mortgage matured.

There is no occasion, therefore, to invoke the rule that governs in case of a wrongful admixture of property.

The bill does show that the "St. Louis Dispatch" was consolidated with the "Evening Post" seven and one-half years before this bill was filed, and that the good will of the former paper was either destroyed or was converted to the use of the new company. But it by no means follows that the effect of such act was to make the first mortgage a lien on all the property thereafter acquired and now owned by the new concern, the Dispatch Publishing Company.

If the consolidation was wrongful in so far as it affected the good will of the St. Louis Dispatch Co. (as to which no opinion is expressed) it could only have the effect of rendering the wrong-doer liable for the value of the good will at the time of its destruction or conversion.

Assuming that the purchaser under the second mortgage wrongfully appropriated or destroyed the good will of the St. Louis
66 Dispatch Co., and that a remedy once existed for such wrong, the question would then arise whether the remedy for the wrong is at law or in equity.

It is not necessary to express an opinion on the latter question, for if a bill to obtain a decree against the Dispatch Publishing Company for the value of the good will in question could at one time have been maintained, based on the ground that it had wrongfully appropriated or destroyed the good will, it seems clear that the right to maintain such bill is now barred by laches, inasmuch as more than seven years had elapsed after the wrong was committed before the bill was filed. An action at law to recover the value of personal property wrongfully converted or destroyed must be brought within five years under the limitation act in this State, and, by analogy with the rule which prevails at law, a proceeding in equity based on similar grounds should be held barred by the same period, even if it is possible to maintain such a proceeding in equity.

3rd. Sufficient reasons also exist, in my opinion, for refusing to order a sale of the share of stock or membership in the Western Associated Press which was hypothecated to secure the Bowman note.

It is evident that the stock in question is not property of an ordinary character, such as may be transferred at will by the owner. The bill shows that it is only vendible to persons or corporations who are engaged in publishing a newspaper or other periodical, and that no other persons or corporations are eligible to membership in the association. It furthermore appears that the stock issued by the association is of the nature of a certificate of membership therein, and that it merely entitles the holder, if he happens to be the proprietor of a newspaper, to receive intelligence which the association is engaged in collecting in for the benefit of its members.

67 It is certainly very doubtful whether stock of that description can be pledged or mortgaged by the holder as security for a debt without the consent of the corporation by whom it is issued. From the statements contained in the bill with respect to the character and functions of the organization known as the Western Associated Press it appears to me reasonably clear that a purchaser at a foreclosure sale of the share or stock or membership now in question, even if the court should order such a sale, would not acquire the privileges of membership in the association unless it should see fit to accord him such privileges. Consent on the part of the corporation to the admission of a member appears to me to be essential to constitute a person a member.

But whether the St. Louis Dispatch Company could or could not of its own motion pledge its membership to secure the payment of a debt it is obvious that the Associated Press is interested in the determination of that question, especially in view of the fact that it has long since admitted another corporation to membership in place of the St. Louis Dispatch Company, and the question ought not to be determined in a proceeding like the present, to which the association is not a party.

Neither would it be proper to order a sale of the interest of the pledgor in the certificate of stock in question unless it appears that some valuable property right or privilege would pass by such sale which the association would be bound to recognize.

From any point of view that may be taken no relief, in my opinion, can be granted consistently with the averments of the amended bill, and the demurrer thereto is accordingly sustained.

68 UNITED STATES OF AMERICA,
Eastern Division of the Eastern Judicial District of Missouri, } *ss:*

I, A. P. Selby, clerk of the circuit court of the United States in and for the eastern division of the eastern judicial district of Missouri, do hereby certify the writing hereto attached to be a true transcript of record in case No. 2883, of Metropolitan National Bank of New York, plaintiff, against The St. Louis Dispatch Company *et al.*, defendants, as fully as the same remain on file and of record in said case in my office.

Seal of the United States Circuit Court, Eastern Division of the Eastern Judicial District of Missouri.

In witness whereof I hereunto subscribe my name and affix the seal of said court, at office, in the city of St. Louis, in the eastern division of said district, this 12th day of October, in the year of our Lord eighteen hundred and eighty-nine.

A. P. SELBY,
Clerk of said Court.

[Endorsed:] No. 2883. United States circuit court, eastern division of the eastern judicial district of Missouri. Metropolitan National Bank of New York against The St. Louis Dispatch Co. *et al.* Duly certified transcript in the above-entitled cause.

Endorsed on cover: Case No. 13,831. E. Missouri C. C. U. S. No. 224. The Metropolitan National Bank of New York, appellant, *vs.* The St. Louis Dispatch Company, The Dispatch Publishing Company of St. Louis, and Henry L. Sutton, trustee. Filed October 19, 1889.

149 U.S. 430

Office Supreme Court U. S.
FILED.
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JAMES H. McKENNEY,
CLERK.

IN THE

SUPREME COURT

OF THE UNITED STATES.

OCTOBER TERM, 1892.—TERM NO. 224.

THE METROPOLITAN NATIONAL BANK OF NEW YORK,
Appellant.

vs.

THE ST. LOUIS DISPATCH COMPANY, THE DISPATCH PUBLISHING COMPANY, of St. Louis, and HENRY L. SUTTON, Trustee,
Defendants.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MISSOURI.

STATEMENT, BRIEF AND ARGUMENT FOR APPELLANT.

JOHN M. DICKSON.
Solicitor for Appellant.

PIERCE BROS. PRINTING CO., LAW BRIEF PRINTERS, 11 N. EIGHTH ST.

IN THE

SUPREME COURT

OF THE UNITED STATES.

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THE ST. LOUIS DISPATCH COMPANY, THE DISPATCH PUBLISHING COMPANY, of St. Louis, and HENRY L. SUTTON, Trustee,
Defendants.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MISSOURI.

STATEMENT.

This is an appeal from a final judgment upon demurrer to appellant's second amended bill of complaint. The bill was filed for the foreclosure of a mortgage upon a certain newspaper, a newspaper plant, and a membership in the Western Associated Press. A demurrer filed

to the second amended bill was sustained by Thayer, Justice, which demurrer is fully set out hereafter. The defendant, St. Louis Dispatch Company, was the maker of the note, and the deed of trust in the nature of a mortgage, hereafter alluded to as the mortgage securing the note. Henry L. Sutton was the trustee therein for the purposes thereof, as fully explained in the deed, (Rec. p. 23.) and the Dispatch Publishing Company was the purchaser of the mortgaged newspaper, newspaper plant, and membership in the Western Associated Press. Before proceeding to a statement of the contents of the bill, we desire to make a few preliminary remarks about the nature of the several properties forming the subject of the mortgage in question.

It is proper to call the attention of the court to some notable differences existing between the several properties we are about to consider and that which usually forms the subject of a chattel mortgage. In discussing the tangible or physical properties, described in the deed of mortgage we call them collectively, a "newspaper plant," in contradistinction to the "newspaper itself," which is described and identified by its name. The language of the mortgage, under which we claim imported that two distinct properties, the "newspaper" and the "newspaper plant" were its subjects. However valuable the "plant," its total destruction would not therefore destroy the "newspaper," and the rights inseparably connected with it. On the contrary such destruction of the so called "plant," need not in the least affect the value of the "newspaper." The fact that the press work or type setting, or any other work immediately connected with the printing and publication of the "newspaper," is done elsewhere than at the publisher's own premises, or upon the publisher's own press and with his or its type, cannot of itself affect the value of the newspaper.

The circulation and advertising patronage, its local and foreign sales, or its subscription lists, advertising contracts and daily sales, are the sources of income to the newspaper publisher.

That which acquires for the newspaper such subscription list, advertising contracts, and daily sales is the NAME and GOODWILL of the newspaper, and such facilities for the acquisition and distribution of news as it may have.

Second. We call attention to the fact set out in the bill and hereafter, that there had been in existence for many years an association called the Western Associated Press, the objects of whose existence are therein specifically stated; but one of whose opjects, and the chief one, is and was the acquisition of news from all parts of the world at cheap rates, for the use of its members, who were, and could only be the owner, or owners, or publisher or publishers, of *a* newspaper or *a* periodical. This membership was acquired by the admission or election under the constitution and by-laws of the association, (See Exhibits E, F and G, pp. 44 and 45.) by the payment of a fixed initiation fee, and maintained thereafter by the payment of a weekly assessment. The element of value in such memberships was the right of members in each district to exclude and prevent any others than themselves from becoming members and thus becoming entitled to the privileges of the Association. In other words the members of this body in any particular city or town or district, as the case might be, had a monopoly of the news—as no individual could compete with the cost at which the news items were procured for the Association's members.

The initiation fee was nominal, as has been said; the privilege of membership, however, invaluable. Such a membership, it is evident, would greatly enhance the value of the goodwill of a newspaper; inasmuch as

the excellence of its news features would naturally tend to the enlargement of its circulation and the consequent increase of its advertising contracts and patronage. The mortgage in question was obviously intended(so far as it was possible,) to cover al l these properties and rights, both tangible and intangible, corporeal and incorporeal. The plant itself, being the physical appliances and appurtenances for the printing and publishing of the newspaper; the office property, where the business of the newspaper was carried on; the property in the various rooms, where the business of collection of news, editing the paper and preparing it for publication, was conducted; the goodwill, the name; and the membership in the Western Associated Press, from the use and inseparable from the use of which was principally derived the circulation and advertising patronage of the newspaper.

After setting out the due incorporation of the several bodies known as the St. Louis Dispatch Company, and the Dispatch Publishing Company, the Western Associated Press, and the Metropolitan National Bank of New York, the bill of complaint states:

'That on or about the first day of June, 1877, the St. 'Louis Dispatch Company owned a certain DAILY EVEN- 'ING NEWSPAPER in the city of St. Louis known as the *St.* '*Louis Dispatch*, and no other property UNCONNECTED 'with and not APPURTENANT to the publication and opera- 'tion of said newspaper; that the newspaper called the *St.* '*Louis Dispatch* had been published continuously for 'many years, to-wit.: since about the year 1852, and 'continued to be published daily, excepting Sundays, up 'to the date thereinafter mentioned; that on the said first 'of June, 1877, the *St. Louis Dispatch* was a fully equip- 'ped journal, having a building under lease—all machinery, 'type, presses, cases, forms, paper, furniture and tools, 'useful or necessary for the printing and publishing of the

'same, a good circulation and advertising patronage (known 'as its good will), and a share of stock in the Western 'Associated Press, under which it was entitled to receive 'telegraphic news and dispatches collected from all parts 'of the world, as thereinafter more particularly set forth.'

That on said first day of June the *St. Louis Dispatch* Company, by deed of trust in the nature of a mortgage, duly recorded, conveyed to Henry L. Sutton as trustee the following described property: the machinery, type, presses, cases, furniture, paper, forms and tools, together with the GOOD WILL of the *St. Louis Dispatch* Company and its franchises of every kind and description, rights and privileges and property, including its interest in the Western Associated Press, and any and all shares by it owned in the Western Associated Press; as also all accounts and choses in action or other valuable thing by it owned or to it belonging wheresoever situated; as also all OTHER PROPERTY of every other nature and character which the said party of the first part MAY ACQUIRE DURING THE EXISTENCE OF THIS DEED OF TRUST."

To secure the payment of the following note, made on said date, to the order of Frank J. Bowman, for the sum of $15,000, payable two years after date, with interest at 9 per cent per annum, payable one and one-half per cent on the first day of August and a like amount on the first day of October, December, February, April and June in each year until the payment of said principal sum.

At the time of the execution of the mortgage, the *St. Louis Dispatch* Company was the owner, on the books of the Western Associated Press, of one share of stock (so called) in said association, and there has been issued to it and had been used by it, for years prior thereto, a certificate of membership numbered 38, which was, upon the execution of the mortgage, placed in the possession of the trustee or in that of some third person for him, with the fol-

lowing writing upon the reverse side thereof: "The within 'certificate of stock is hereby assigned and transferred to 'Henry L. Sutton, trustee in deed of trust bearing date 'of June 1st, 1877, for like purposes as other property 'therein named is transferred, being the certificate of stock 'therein referred to."

(Signed) W. R. ALLISON, President,
For St. Louis Post Dispatch Company.
(Record, p. 3.)

That said membership was and is of very great value, to-wit.: of the value of fifty thousand dollars ($50,000.00.)

A second deed of trust expressly subject to this was thereafter placed upon this property (the description therein being identical with the description in the first), and there having been a forfeiture thereunder, the above property was advertised for sale by one R. S. MacDonald, the trustee in the second deed of trust, subject to the first mortgage, and was sold subject thereto on the 9th day of December, 1878.

The property was bid in by one Simon Arnold for Joseph Pulitzer, who about the same time, with one John A. Dillon and wife, organized a corporation called the *Dispatch* Publishing Company, and which company shortly after said sale and within a few days entered into possession of all of the foregoing property described in said first mortgage, at the premises No. 111 N. Fifth street, where the *St. Louis Dispatch* Company had its business office and printing-house, and from which said paper was published and distributed. (p. 9.)

John A. Dillon, one of the corporators of the *Dispatch* Publishing Company, was, at the date of its organization, the publisher of the *Evening Post*—an evening newspaper—which had only then been established a few months, had no printing-house or publishing facilities of its own—a

small circulation and advertising patronage, and no membership in the Western Associated Press or any special telegraphic facilities, or other facilities for gathering foreign news, and was of little or no value. (p. 8.)

The *Dispatch* Publishing Company after entering into possession of the newspaper property and the publishing and printing plant at No. 111 N. Fifth street (occupied by the *St. Louis Dispatch* Company at time of the sale of its property), and remained there for some time after the maturity of the mortgage which we are seeking to foreclose. (Pp. 9 and 10.) In the meantime (as we endeavor to make clear in our bill) and immediately after the formation of the *Dispatch* Publishing Company, the latter company began the publication of the *St. Louis Post* and *Dispatch* or *St. Louis Post-Dispatch*, using the publishing and printing departments and properties therein contained of the *St. Louis Dispatch* Company for that purpose; the property contained in the business office at the same number, all other property in all of its other departments connected with the publication of a newspaper, or with the preparation of matter for the publication thereof. Chiefly and above all, it took possession of the subscription lists of the *St. Louis Dispatch* Company, appertaining to the *St. Louis Dispatch* newspaper, its advertising contracts, carrier routes, &c., &c. And in the publication of the newspaper, received, in virtue of the membership standing on the books of the Western Associated Press in the name of *St. Louis Dispatch* Company, and as purchaser and survivor in the ownership of said newspaper—daily telegraphic news distributed by said association to all its members, as previously explained, the certificate remaining as yet in the hands of Henry L. Sutton as trustee, for the purposes appearing by the writing upon the reverse side thereof, by us previously quoted. (Pp. 9 and 10.) On the first day of February, 1879, (not

two months after the sale under the second deed of trust and the entry by the *Dispatch* Publishing Company into the possession of the various properties), it paid the first two months' instalment of interest to this plaintiff, and followed it up by paying every successive two months' interest instalment, until the date of the maturity of the note on the first day of December, 1879, when it declined to pay both the interest instalment then due and the principal sum of $15,000. (P. 11.)

In the bill, it is in effect stated that, during this period, elapsing between the date December 9th, 1878, and December 1st, 1879, much of the property in the printing and publishing departments as well as that contained in the business office, and in various other parts of the building of a tangible or corporeal nature had been alienated or used up, and other property of a like or similar character substituted. (See pp. 12 and 13.)

It is also in substance alleged that, after the maturity of the note on the first day of December, 1879—and several months thereafter—the Dispatch Publishing Company succeeded in procuring a new certificate from the Western Associated Press issued by it in lieu of the certificate held by H. L. Sutton, trustee in the first mortgage, as previously explained, and became a member of said association on its books, as the purchaser of the St. Louis Dispatch newspaper, and the successor of the St. Louis Dispatch Company in the ownership of the same—succeeding to that Company's rights and liabilities in such membership (Record p. 20) The by-laws of said association, as well as its articles of association, are distinctly referred to in the Bill and made part thereof, and are contained *in extenso* in the Record, pages 41 and 45. We shall frequently refer to them, in explanatiou of the nature of the memberships and the peculiarities of their tenure, in special reference to the mortgagee's rights therein.

Upon all these facts the petition predicates certain

CONCLUSIONS OF FACT AND OF LAW.

I.

First (a) That the newspaper; (b) the newspaper plant (appurtenances of the newspaper) and (c) the membership in the Western Associated Press (also an appurtenant of the newspaper) were severally subject to the lien of the mortgage and conjointly—as one homogeneous property. Treated as one homogeneous property, in which each part in its operation is aided in the support of the property as a whole, the complaint charges that any portion of this property lost and destroyed, etc., and for which other properties of a like kind, whether a press, a new certificate of membership or even a newspaper having a different name, should each be subjected to the lien of the mortgage in conjunction with the rest of the "homogeneous whole" which in its entirety had been originally made the subject of the mortgage.

Second. Treated in severalty, there was still subject to the mortgage the NEWSPAPER *St. Louis Dispatch* or its substitute *St. Louis Post-Dispatch.* The membership in the Western Associated Press—represented in the first instance by certificate 38 and thereafter by its substitute certificate 64—and the so-called "plant" or its substitute.

Third. (a) The identity of the *St. Louis Dispatch* and *St. Louis Pos'-Dispatch.* (b) The identity of the memberships represented by certificates 38 and 64. Therein of the pretense pleaded (x) that the newspaper called *St. Louis Dispatch* was as a property destroyed by the addition of the word "Post"—so as to make it read *St. Louis Post-Dispatch.* (y) The membership represented by certificate 38 was lost by the issuance to the defendant of certificate 64 in lieu thereof.

II.

That defendant was (is) estopped to deny:

First. (a) That it had agreed with its grantor to pay the mortgage debt (b) that it had agreed to charge property after acquired in the plant (appurtenant to the publication of the newspaper) with the lien of the mortgage just as the original mortgagor had agreed. (c) That it had agreed with its grantor to put itself in the shoes of the mortgagor.

Second. That defendant was estopped to deny the identity (a) of the two newspapers; (b) of the memberships represented by the several certificates; (c) of the two plants; (x) by reason of the similarity of the names; and the confusion of the good wills incident to such change wilfully made, so as to destroy the identity of the mortgaged newspaper; (y) because the two certificates in fact represented the same membership; (z) because from the nature of the plant all changes made were in the nature of repairs to one vast machine, parts of which had to be replaced from time to time, by reason of constant use, wear and tear—from which resulted a confusion of mortgaged and unmortgaged chattels, making the identification of the several parts of the original mortgaged "plant" impossible.

III.

That defendant had agreed and assumed to pay the mortgage debt.

IV.

First. That the two certificates were issued in the same right, *i. e.*, because the membership represented by certificate thirty-eight stood in the name of the St. Louis Dispatch Company upon the books of the com-

pany (the Western Associated Press,) and the defendant acquired as purchaser or successor in the ownership of the *St. Louis Dispatch* newspaper, and its name was placed upon the books of the association as the transferee of the St. Louis Dispatch Company (successor in the ownership of the newspaper,) and the certificate sixty-four was issued in lieu of thirty-eight, and as representative of the same membership.

Second. That defendant is and was estopped to deny that the memberships were the same by conduct and silence, in reference to the membership. (See Record, p. 20, 21 and 22.)

PRAYER OF COMPLAINT.

I.

"Your orator further avers the defendant has now in 'its possession and under its control the goodwill of the 'St. Louis Dispatch Company, its membership in the 'Western Associated Press, and all its machinery, 'presses, type, furniture, paper forms and tools, its rights 'and privileges and property or substitutions therefor. 'To the end, therefore, that the said defendants may 'answer the several matters and things as fully and particularly as if they were herein again specially interrogated, *and the good will of* and other property or substitutions for the other property of the St. Louis Dispatch 'Company sold to and in the control of the Dispatch 'Publishing Company, including the membership in the 'Western Associated Press, consisting more particularly 'of machinery, presses, type, cases, office furniture and 'fixtures, papers, forms and tools, and other material used 'in the connection with the operation of its business by 'the Dispatch Publishing Company and in connection

'with the publication of its newspaper, may by this Honor-
'able Court be decreed to be sold for the payment of
'your orator's claim, with interest at the rate of nine per
'cent. per annum from the first day of October, 1879.

'That the Dispatch Publishing Company may be de-
'creed to pay to your orator the sum of $15,000 and the in-
'terest thereon, as just recited, and that your orator may
'have such other and further relief in the premises as the
'nature of its case may require and to Your Honors may
'seem meet." (Record, p. 22 and 23.)

The demurrer of defendant to this Bill of Complaint was as follows, excluding the formal parts:

'That the said complainant hath not by his Bill made
'or stated such a case as does or ought to entitle it to any
'such discovery or relief as is hereby sought and prayed
'for, from or against this defendant.

II.

'That the defendant in and by its said Bill claims to have
'lien upon the "good will of the St. Louis Dispatch
'Company," averred to be owned and possessed by this
'defendant, and said amended Bill does not show what
'said good will consists of, and to what property, rights
'or business it is incidental or appurtenant, and because
'said Bill does not show of what said good will now
'consists as owned or possessed by this defendant, nor
'the value thereof, nor to what property, circulation of
'newspapers, business advertisements or patronage it is
'inherent or incidental, and in that there is nothing in
'all averments of said complaint which enable this court
'to intelligibly, conscientiously, or reasonably ascertain
'and determine of what said good will consists or how it
'can be made the subject-matter of a decree of foreclosure
'as prayed in said complaint; and in that said good will
'appears by this petition at this date to be entirely dis-

'tinct and separate from the property and business to 'which the same belonged at the time the complainant 'acquired his rights under the first mortgage as set forth 'in the complaint; and in that said good will appears by 'the second amended complaint to have been so con-'fused and commingled with the business and good will 'acquired by this defendant through its own efforts as 'the result of its own legitimate business as to be in-'separable therefrom and incapable of separation; and 'in that said good will, as appears by said complaint, 'was at the time this defendant received the same so in-'termingled and confused with the good will of the St. 'Louis Evening *Post* and the Evening *Star* as to be in-'capable of separation therefrom, and cannot therefore be 'made the subject of a decree or order of sale by this 'court at this time; and in that it appears by said Bill 'that said good will is so uncertain, intangible, and of 'such unknown properties, character and extent and 'meaning as to be not the subject of a lien which a court 'of equity can reasonably and intelligibly enforce by de-'cree of sale.

III.

'And that it appears by the complainant's said bill that 'the Western Associated Press, a corporation organized 'under the laws of the State of Michigan named in said 'bill, is a necessary party to the same, inasmuch as it is 'therein shown that no relief con be granted by way of 'foreclosure and sale of the certificate of membership in 'the Western Associated Press except by the consent of 'said Corporation or by having the rights and interests 'of said corporation settled and determined in this suit in 'advance of such decree; but the said complainant has 'not made the said Western Associated Press a party 'to the said amended bill.

IV.

'And that it appears by the said amended bill that the 'same is exhibited by the complainant against the defen- 'dant and the St. Louis *Dispatch* Company and Henry L. 'Sutton, trustee, as defendants therein, for several distinct 'matters and causes, in many whereof, as appears by said 'bill, this defendant is in no way interested, and by reason 'of such distinct matters the said blll is drawn out to a 'considerable length, and this defendant is compelled to 'take a copy of the whole thereof, and by joining distinct 'matters together, which do not depend upon each other, 'the proceedings in progress of the said cause will be in- 'tricate and prolix and this defendant put to unnecessary 'charges and expense in matters which in no way relate to 'or concern it.

V.

'And that, as appears by said amended bill of com- 'plaint, the cause of action set out as arising to the plain- 'tiff on account of or by reason of the several allegations 'and complaints in said bill contained did not accrue 'within five years before the said bill was filed, whereby 'the complainant's cause of action as set forth in said bill 'is barred by the Statute of Limitations.

VI.

'And that it appears by the allegations of said bill that 'ever since the month of January, 1879, this defendant 'has had, held, used and enjoyed the certificate of mem- 'bership claimed by it in the Western Associated Press 'and the good will of the St. Louis Dispatch Company 'without objection or protest from the complainant or 'those under whom it claims; that during all that time it 'appears that the complainant and those under whom it 'claims have had full, ample and open opportunity to

'have controverted defendant's claim as aforesaid, and to 'have asserted by its bill in equity or otherwise, the lien 'and claim set out in the amended bill of complaint, and 'it further appears that, notwithstanding the premises, 'the plaintiff has suffered and allowed the defendant to 'hold said membership and good will and continue to 'enjoy the same at great expense to itself for the period 'of nearly nine years without objection or protest.

'Wherefore defendant says that by reason of the com- 'plainant's laches, it ought in equity be barred and 'estopped from now asserting the pretended claim set out 'in the complaint.

'That the complainant has not by his said amended bill 'shown such a case as entitles him to any such relief as is 'thereby prayed, inasmuch as it does not hereby appear 'that there was any impediment to an action at law being 'brought by the said complainant to ascertainh is right and 'that of this defendant relative to the certificate of member- 'ship in the Western Associated Press and to the good will 'of the St. Louis Dispatch Company, or that in any trial or 'action, verdict or judgment has been hitherto obtained 'by said complainant for that purpose, or that there was 'previously or at the time the said bill was filed or now is 'any authentic record of such right. Wherefore," &c.

Since the date of the filing of the transcript in this case the corporate franchises of Dispatch Publishing Company were forfeited by a decree rendered in *quo warranto* proceedings instituted by the State of Missouri at the relation of the Circuit Attorney of the city of St. Louis, because the defendant company had failed to comply with certain laws relating to trusts, in this, that it had failed to reply to a letter addressed to it by the Secretary of State for Missouri, inquiring whether or not it, the Dispatch Publishing Company, was, as a matter of fact, a member of

any trust, &c. Under this decree the directors of the Dispatch Publishing Company were made trustees to wind up its affairs, pay its debts, &c. Thereafter the property and assets of the Dispatch Publishing Company, being the newspaper called *St. Louis Post Dispatch* and the newspaper plant used in connection therewith and all of its other property was transferred to the Pulitzer Publishing Company, a corporation recently formed. All of these facts are duly set out in a stipulation filed in this court, signed by complainants' solicitor and solicitors for Pulitzer Publishing Company and for the directors acting for the Dispatch Publishing Company at the time of its dissolution; and have entered the appearance of said new parties herein. (See stipulation filed in this case in this court, to which the proceedings of forfeiture are attached.)

BRIEF.

PROPOSITION I.—Whatever has pecuniary value and over which the dominion can be transferred from one to another, either by actual or symbolic delivery, is property which may be subjected, either through the processes of law or equity, to the judgments or debts of creditors.

Corrollary (a).—A membership in a Stock Exchange, a Produce Exchange, a Board of Trade, or any other association, whose constitution and by-laws provide a method (whatever the restrictions and limitations) of transferring the membership of one member to a third person (whatever may be the required qualifications) and from the sale of which in the prescribed manner, money or moneys' worth may be derived, is property.

Hyde vs. Woods, 94 U. S., 523.
Elliott vs Merchants' Exchange.
Matter of Werder, 15 Fed. Rep., 800.
Sparhawk vs. Yerkes, 142 U. S., 12, and cases cited.
Powell vs. Waldron, 89 N. Y., 331.

Corollary (b).—And so are good wills, trade names, trade marks, copyrights, patent rights and newspapers, property, as well as other incorporeal rights, which, as a class, have been not inaptly designated "Incorporeal Personalty," in contradistinction to "Incorporeal Hereditaments." Shares of stock in ordinary trading corporations are really the best examples of this class of personalty.

Sebastian Law Trade Marks, 317.
Am. Encyc. Law, Goodwill, 1371.
Churton vs. Douglas, 1 Johns Ch., 174.
Sebastian Law of Trade Marks, 329. Ibid. 335.
Boon vs. Moss, 70 N. Y., 473–4.
Am. Encyc. of Law, 1372. Ibid. 1371. Ibid. 1370.
Dayton vs. Wicks, 17 How. Pr. 510, 511.
Bradbury vs. Dickens, 27 Beaven, 61.
Ex parte Foss, 2 De Gex and Jones, 239.
Longmann vs. Tripp, 5 Bosanquet and Puller, 67.
Sebastian Law of Trade Marks, 327; cases cited.
McCormick & Carnie vs. McCabbin, *et al.* Ct. of Sess. Cas., 1st Ser., I, 496.
Edinburgh Newspaper Correspondent. Ct. of Sess. Cases, 1st Ser., Vol. I, p. 407.
Ager vs. Murray, 105 U. S., 129.
Stephens vs. Cody. 14 How. Pr., 561.

PROPOSITION II.—A Court of Chancery, in the exercise of its general jurisdiction, will assist a judgment or specialty creditor to reach and apply to the payment of his debt "any property" of the judgment or specialty debtor, "which, by reason of its nature only and not by reason of any positive rule exempting it from liability for debt," is not the subject of execution at law or of physical seizure.

Ager vs. Murray, 105 U. S., 129.

Wherein are cited McDermott vs. Strong, 4 Johns (N. Y.) Ch. 687.

Spader vs. Hadden, 5 Id., 280; and 20 Johns (N. Y). 554.

Edmeston vs. Lyde, 1 Paige (N. Y.) 637.

Wiggen vs. Haywood, 118 Mass., 514.

Sparhawk vs. Cloon, 125 Id., 263.

Daniels vs. Eldredge, 125 Id , 356.

Drake vs. Rice, 130 Id., 410.

PROPOSITION III.—A chattel mortgage covers accessions thereto, and repairs and improvements are to be deemed accessions.

Boone Law of Mortgages, Sec. 244, and cases cited.

Corrollary (a) to Prop. III.—Where the property forming the subject of a chattel mortgage is composed of many parts, as, an engine, a mill, a manufacturing establishment, or a newspaper establishment, repairs and improvements thereto, are to be deemed accessions to the plant, taken as a whole, or to any of the parts of that whole.

Hamlin vs. Jerrard, 72 Mo., 62.

Southworth vs. Isham, 3 Sand., 448.

See also Marx vs. Davis, 56 Miss., 745; 55 Miss., 376; 87 Ind., 550.

Alternative Prop. to Prop. III.—If the mortgage does not attach to the accessions made by way of repair or improvement, to the whole of the plant or any of its parts, then a decree must at least go for the deficiency between the amount realized at a foreclosure sale, and the value of the property lost, destroyed or used up.

Beers vs. Waterbury, 8 Bosworth (N. Y.). 396, 413.

PROPOSITION IV.—The rule of law is clear that where one by his words or conduct wilfully causes another to believe the existence of a certain state of things, and induces him to act on that belief so as to alter his own previous position, the former is concluded from averring against the latter a different state of things as existing at the same time.

Cababe on Estoppel, 85.
Carr vs. London N. W. R. Co., 10 C. P., 307.
Bigelow Estop. 492 (4th ed.)
Herman Estop., 127.
Bates vs. Perry, 51 Mo., 449.
Pickard vs. Sears, 6 Ad. and E., 469.
Cababe on Estoppel, 83; Ibid. 63; Ibid. 64, 65.
Bigelow, 645, and cases cited. Ibid. 649, and cases cited.
Darell vs. O'Dell, 3 Hill, 219.
Taylor *et al.*, vs. Zepp, 14 Mo., 488.
Acton vs. Dooley, 74 Mo., 67.
Blodgett vs. Perry, 97 Mo., 273.

PROPOSITION V.—Neither the ten years nor five years Statute of Limitations of Missouri in personal actions can be a bar to the foreclosure proceeding.

PROPOSITION VI.—The doctrines of laches cannot be pleaded under the facts alleged. The doctrine of laches, as applied under Equity Practice, is not applicable under Missouri Code of Practice.

Kelly vs. Hurt, 61 Mo., 466.
Spurlock vs. Sproule, 72 Mo., 511.
Bliss vs. Prichard, 67 Mo., 192.
Dobyns vs. Rice, 22 Mo. App., 457.
Vanderline vs. Smith, 18 Mo. App., 61.

CORROLLARY (A) PROPOSITION I.

Membership Property.

Judge Miller in the case of Hyde vs. Woods, 94 U. S. 523, says: "There can be no doubt that the incorporeal right which Fenn had to this seat, when he became bankrupt, was property; and the sum realized by the assignee ($10,000.00) from its sale proves that it was valuable property. Nor do we think there can be any reason to doubt that, if he had made no such assignment, it would have passed, subject to the rules of the stock board, to his assignees in bankruptcy; and that if there had been left in the hands of the defendants any balance, after paying the debts due to the members of the board, balance might have been recovered by the assignee."

Judge Choate, in a certain case quoted by Bakewell in case of Elliot vs. Merchant's Exchange—as having been 'decided in the Circuit Court of the United States for the 'Southern district of New York—says: "As in that case '(referring to the case of Gallagher vs. Lane *in re.* B. R. '224) the consent of the City was necessary to a transfer, 'so here the consent of a committee of the Stock Ex-'change is necessary to a transfer of this right. The 'seat, however, has an actual pecuniary value which the 'rules of the society, as interpreted and applied in prac-'tice, permit the holder to realize by a sale or transfer. 'There is no practical difficulty in effecting a transfer of 'this right or interest for a pecuniary consideration, sub-'ject to the condition that the debts of the present holder 'to members are first paid; and the right or privilege is, 'to all intents and purposes, a business right or privilege, 'useful for business purposes only. I see nothing in the 'rules of the exchange which renders it impossible for the 'seat to be disposed of by the assignees in bankruptcy 'with the co-operation of the bankrupt, subject to the

'condition as above mentioned." [See Elliot vs. Merchants' Exchange, 14 M. A., 241.]

Speaking of the remarks heretofore quoted and made by Justice Miller in Hyde vs. Woods, which is also quoted by him, McKennan J., United States Circuit Court, N. J., in matter of Werder, says: "It is futile to contest the 'authoritativeness of this statement by the criticism that 'it was unnecessary to the decision of the question before 'the Court, and therefore was only the individual opinion 'of the judge who spoke for the Court. But it was not 'only proper, but necessary, to ascertain and determine 'the nature and character of the interest claimed by the 'plaintiff, that the Court might pronounce judgment upon 'the merits of the controversy between the parties. The 'plaintiff was the assignee of a bankrupt member of the 'San Francisco Stock Exchange. If the bankrupt's 'membership in that institution was a mere personal 'privilege, and in no sense property, then it did not pass 'under the assignment, and the plaintiff could not maintain any action touching it for want of title. But to consider the merits at all, and to determine the legal rights 'of the parties in reference thereto, it was necessary for 'the Court to define the character of the subject of the 'controversy, and so to pass upon the validity of the 'claim of the defendants to the proceeds of its sale; they 'therefore held it to be property which passed under the 'assignment in bankruptcy, subject to the rules of the 'exchange which provided for the prior appropriation of 'the proceeds of its sale to debts due to its members, and 'hence that such appropriation was not within the scope 'of the provisions of the bankrupt law against preferences."

Matter of Werder, Fed. Rep., 800.

Chief Justice Fuller, in Sparhawk vs. Yerkes, 142 U. S., 12, says: "In Hyde vs. Woods, 94 U. S., 523, 'it 'was ruled that the ownership of a seat in a stock and

'exchange board is property, not absolute and unqualified, 'but limited and restricted by the rules of the association; 'that such rules in imposing the condition upon the disposition of memberships that the proceeds should be first 'applied to the benefit of creditor members, are not open 'to objection on the ground of public policy, or because 'in violation of the bankrupt act; and that in the case of 'the bankruptcy of a member his right to a seat would 'pass to his assignees, and the balance of the proceeds 'upon sale could be recovered for the benefit of the estate. 'While the property is peculiar and in its nature a personal 'privilege, yet such value as it may possess, notwithstanding the restrictions to which it is subject, is susceptible of being realized by creditors. (Ager vs. Murray, '105 U. S., 126; Stephens vs. Cady, 14 How, 528; 'Powell vs. Waldron, 89 N. Y., 328; Belton vs. Hatch, '109 N. Y., 593: Habenicht vs. Livsak, 78 Cal., 351; 'Weaver vs. Fisher, 110 Ill., 146; Sparhawk vs. Yerkes, '142 U. S., 12.) We think the right of the judgment debtor to a seat in the Cotton Exchange 'was property. That it had value was proved and 'is conceded; and that it could be transferred to 'a certain class of purchasers, under prescribed rules 'and conditions, is also established. The defendants took it as collateral to the note of Robbins and held 'it as security for that debt and thereby plainly treated it 'as valuable property. Although of a character somewhat peculiar, its use restricted, its range of purchase 'narrow, and its ownership clogged with conditions, it was 'nevertheless a valuable right, capable of transfer, and 'correctly decided to be property. (Hyde vs. Woods, 4 'Otto, 524; Ritterband vs. Baggett, 42 Supr. Ct. [10 J. '& S.], 556; Grocers' Bank vs. Murphy, 11 Week. Dig., '538; *In re.* Keeham, a bankrupt, Daily Reg , Feby. 9, '1880.]

"*It was something more than a mere personal license* ' *or privilege, for it could pass from one to another of a* ' *certain class of persons and belong as fully to the as-* ' *signee as it did to the assignor. That characteristic gave* ' *it not only value, which might attach to it a bare per-* ' *sonal privilege, but market value which usually belongs* ' *only to things which are the subject of sale. How-* ' *ever it differed from the incorporeal rights earlier re-* ' *cognized and described, it possessed the same essential* ' *characteristics. It could be transferred from hand to* ' *hand and all the time keep its inherent value, and be as* ' *freely and fully enjoyed by the permitted purchaser as* ' *by the original owner. We should make of it an* ' *anomaly difficult to deal with and to understand, if we* ' *failed to treat it as property. Being property, it* ' *passed to the receiver in the supplementary proceedings,* ' *subject to the lien or rights of the defendants.*"

Powell vs. Waldron, *et. al.* 89 N. Y., 331.

See Belton vs. Hatch, 109 N. Y., 594—

which is *not in conflict* and gives a correct summary of the principles governing this class of property.

SUB-DIVISION—CORROLLARY (A) TO PROPOSITION I.

Memberships in the Western Associated Press are property and may be sold and transferred.

I.

A membership in the Western Associated Press was property, and could be sold under the provision of the association's own by-laws to persons possessing the qualifications to hold, use and enjoy the same. By-laws Western Associated Press.

II.

A Court of Equity would subject such a membership,

to sale for the payment of the debts of the holder, by decreeing a sale thereof to some person competent to hold. *A fortiori* would it decree its sale, where the holder had sought by deed to specifically subject it to a mortgage lien. Authorities cited under Corrollary (a) Proposition I.

III.

And if in order to effectuate the sale of such membership, it would be necessary under the by-laws of said association to sell the newspaper in conjunction with which it was held and used, a Court of Equity would decree the sale of the newspaper, even though *the newspaper* itself was not the subject of the lien sought to be effectuated against the membership, if the holder of such membership had purchased it expressly subject to a mortgage lien its grantor had sought to impose upon it, and in connection with a newspaper also purchased expressly subject to a mortgage lien with which its grantor likewise had sought to affect it. Cases cited under Proposition II.

IV.

A membership, under the by-laws of the Western Associated Press, could only be acquired in two ways. 1st, By being a purchaser or successor in the ownership of the newspaper of a member selling the same; and, 2d, By the unanimous election to membership by the vote of all members residing in the city or town where the applicant for membership resided.

And any person purchasing the newspaper of another could acquire from the seller the latter's membership.

Unless therefore it appears that defendant acquired a membership by the unanimous election of all members in the city of St. Louis, it must be held to have acquired its title by its successorship in the ownership of

the St. Louis Dispatch newspaper, and even if defendant could show it had acquired the membership by the unanimous consent of the members in St. Louis, such membership would still be chargeable with the mortgage lien attaching to the membership *it* could have acquired as successor in the ownership of the St. Louis Dispatch newspaper; because its failure to so acquire this identical membership and its application for independent membership, would obviously be acts done with the fraudulent purpose of defeating the mortgagee of its rights in the membership sought by defendant's grantor to be charged with the lien of the mortgage.

By-Laws Western Associated Press.

V.

That by operation of the doctrine of estoppel defendant would not be permitted to deny the identity of the memberships represented by the several certificates, because it *used* the membership as the successor in the ownership of the St. Louis Dispatch newspaper, and whilst the certificate 38 was outstanding for a year before it made any application for a certificate in its own name and for the transfer to it upon the books of the membership; and because its certificate was issued to it and the transfer made for the reason that it claimed to be the successor in the ownership of the St. Louis Dispatch newspaper.

By-Laws.

VI.

The fact that the Western Associated Press issued to defendant a certificate of membership and placed its name upon its books as a member, "As the successor in the ownership of the St. Louis Dispatch newspaper," without having had presented to it for cancellation and

without any cancellation of the old certificate, does not destroy the identity of the membership. The second *certificate* must represent the same membership, if the second certificate was issued and the transfer made in the manner stated. It is not therefore necessary to join the Western Associated Press to determine the mortgagee's right to the membership; because if the two certificates represent the same membership, the second certificate stands in the place of the first; and if the sale of the second certificate would be the most effectual mode of transferring to the purchaser at the foreclosure sale the title to the membership a court of equity would so decree its sale, and order the first certificate to be surrendered to the Association for cancellation.

The Western Associated Press, therefore, is not only not a necessary, but it is not even a proper party defendant herein.

By Laws.

Cases cited under Proposition II.

Weaver vs. Fisher, 110 Ills., 146.

VII.

So long as the membership can be traced back to the St. Louis Dispatch Co. and its assigns as a source of title, it makes no difference by what certificate it is represented, or in whose name it may stand, so long as the holder takes with notice of the lien of the mortgage and is before the Court as a party defendant.

If therefore it appears from the record that the Dispatch Pub. Co. has gone out of existence and its property including this membership has been transferred to the Pulitzer Publishing Company, the membership can be sold under the decree by the sale of the certificate, whatever be its number *now* held by the Pulitzer Publishing

Co. in the same manner as certificate 68 might have been sold had the last transfer not been made.

By Laws.

ARGUMENT ON MEMBERSHIP—WESTERN ASSOCIATED PRESS.

Perhaps the best method of determining whether or not the membership in the Western Associated Press now held by the Dispatch Publishing Company and its successors, is chargeable in its hands, in any manner, for the debt sought to be forced upon the membership in the hands of the St. Louis Dispatch Company, is to briefly examine the laws and by-laws of the association, and to endeavor to arrive at their meaning. And, in the first place, it is not perceived why these by-laws should not be construed by the aid of the usual canons of construction.

Who May Become Members—Membership (1). "Any 'proprietor of a daily newspaper who has heretofore signed 'the articles of association and is now an active member of 'the same, and his lawful assigns, and any such person or 'firm or corporation within the territory of the Western 'Associated Press who shall hereafter be admitted in ac-'cordance with these by-laws, shall be a member of the 'association, provided that no new member shall be 'elected except upon the terms prescribed by Article XV."

Admission of New Members.—XV. "Applications 'for membership in this association shall be made 'in writing to the Board of Directors, and if a majority 'of said board shall vote for the admission of the appli-'cant, he shall sign the articles of association and by-laws, 'and pay into the treasury the sum of ten dollars or an 'additional amount equal to what would be his *pro rata*

' share in the property of the association. It shall then ' be the duty of the secretary to issue to him a certificate ' of one share of stock, and to enroll his name in the list ' of membership; provided, that *no new members shall be admitted without the unanimous consent of the members in the city or town where his business is carried on.*"

Transfers.—XII. "Any member selling or transferring his *newspaper*, may transfer his certificate of stock to the purchaser or successor in the ownership of such *newspaper*, and it shall be the duty of the Secretary, upon request, to transfer the same on the books of the Association to such purchaser or successor, who shall then sign the Articles of Association and by-laws, and become a member, with the same rights and privileges as the original member. *If* any member shall discontinue the publication of a newspaper, or shall sell his newspaper to another member, his membership shall cease, and his certificate of stock shall be cancelled on the books of the Association, and the Treasurer shall refund to him the money paid to the Association for the same."

These several by-laws were printed on the face of the so-called certificates of stock, so that every holder had notice of the terms thereof. We believe the language of these several by-laws is sufficiently lucid, taken in connection with what has already been said about the nature and object of the Association itself. We naturally deduce that these certificates represented "membership" and not "shares of stock;" and that *no new member* could be admitted "*without the unanimous consent of the members in the City or Town where his business is carried on,*" with the single exception made in by-law XII, in favor of persons purchasing a *newspaper* from a member, who would, upon signing "the Articles of Association and by-laws, become a member with *the same rights and privi-*

leges as the original member." This is the simple, natural and obvious meaning of these by-laws, and no membership could be acquired in this Association at the times in question "by any person, firm or corporation," except, *first*, "by the unanimous consent of the members in the City of St. Louis;" or, *second*, as the transferee of a "*member selling or transferring his newspaper.*" Of course, when we say "could be acquired," we mean lawfully acquired under the terms of the by-laws quoted. Recurring to the Bill, we find it stated in effect that the Dispatch Publishing Company was not elected by the "unanimous consent of the members in the City of St. Louis," but on the contrary it became a member as the "purchaser or successor in the ownership of" . . . the *St. Louis Dispatch* "newspaper," under by-law XII. of Western Associated Press.

The title of the Dispatch Publishing Company to the "newspaper" and to the "membership" are equally derived from the sale of the St. Louis Dispatch newspaper, under a second mortgage and subject to a first mortgage, on the 11th of December, 1878. That the Dispatch Publishing Company claimd this membership as purchaser or successor in the ownership of the St. Louis Dispatch newspaper and was so recognized by the Western Associated Press, is eloquently attested by the payment of weekly dues to the Association on the one hand, and the extension on the other of all the privileges of membership to the Dispatch Publishing Co., for a year before any formal transfer of membership was applied for or sought to be made. Of course, the Dispatch Publishing Co. could not claim to be entitled to a membership, nor could the Association allow such a claim, by any other right than that of "purchaser or successor in the ownership of the St. Louis Dispatch "newspaper," unless the Western Associated Press distinctly conserted

to violate its own most vital by-law and to enter into a combination with the Dispatch Publishing Company to destroy the rights of third persons. Will it be assumed that the Western Associated Press thus acted, when its conduct is fully explicable upon an honest basis? It does, however, appear by the complaint that there are two certificates outstanding—one is the certificate held by the Trustee in the first deed of trust numbered—and upon which appears the assignment (so-called) for like purposes, as the other property recited in the mortgage of even date, and the other, the certificate procured by the Dispatch Publishing Company to be issued just after the maturity of the note of $15,000 in December, 1879, or January, 1880. We allege that both these certificates represent the same right and the same membership (p.), that is, the membership appertaining to the St. Louis Dispatch newspaper or passing under By-law XII, "to the purchaser or successor in the ownership of such newspaper." And if any rights passed to the mortgagee in the first deed of trust or his assigns in this membership, in virtue of the deed of trust itself or the conditional assignment of the certificate held by the St. Louis Dispatch Company, said rights were maintained by "the purchaser or successor in the ownership of such newspaper." In other words, the membership now in use by the Dispatch Publishing Company is the identical one in use and sought to be charged with the mortgage lien by the deed and conditional assignment of June 1st, 1877. *There was no forfeiture.* (The complaint alleges there was none, p.). and the certificate issued to the Dispatch Publishing Company was doubtless in a supposed literal compliance with By-law XII, upon the hypothesis that the Dispatch Publishing Company was "the purchaser or successor in the ownership of" the St. Louis Dispatch "newspaper." The question then presented is this: that whilst it is pos-

sible that the Western Associated Press did not do wrong (or an unlawful act under its laws), when it issued a new certificate to the Dispatch Publishing Company and placed its name upon its books as "the purchaser or successor in the ownership of" the St. Louis Dispatch "newspaper" without first demanding the return and cancellation of the certificate outstanding in the name of the St. Louis Dispatch Company; it is utterly impossible that such action (whether wrong or right) by the Western Associated Press could in any way affect the liabilities of "the membership" in the hands of such "purchaser or successor in the ownership" of said "newspaper," if in fact any valid claim existed against such membership in the hands of the St. Louis Dispatch Company, publishers of St. Louis Dispatch newspaper, in favor of the mortgagee in the deed of June 1st, 1877, or its assigns.

But we should add there is an estoppel *in pais* against the Dispatch Publishing Company, denying the fact that it acquired this membership in any other way than as purchaser or successor in the ownership of the St. Louis Dispatch 'newspaper,' and against its assertions of ownership of a new and distinct membership, because it did purchase the St. Louis Dispatch newspaper, and did use said membership for a year, while it still stood in the name of the St. Louis Dispatch Company in the books of the Western Associated Press, and received them in virtue only of its alleged successorship in the ownership of said newspaper. (See Bill p.) In a contract between them, the W. A. P. could not deny its right to the use of the membership, upon proof by the Dispatch Publishing Company, of its successorship in the ownership of the St. Louis Dispatch 'newspaper;' nor could the Dispatch Publishing Company claim any membership, or right to the use of any membership, except as such 'successor' unless in fact, it had made formal application and had

applied for its admission, the unanimous consent of the members in the City of St. Louis. How much less could the Dispatch Publishing Company claim distinct ownership, whatever certificate it might hold or in whosoever name stood the membership on the books of the company, against the mortgagee subject to whose rights it professedly acquired its interest and became the successor in the ownership of the St. Louis Dispatch newspaper. Indeed the estoppel would extend far enough to defeat the Dispatch Publishing Company's claim to distinct ownership even if it had been admitted into the association by the unanimous consent of the members in the City of St. Louis, because such application of it could only be made with the view of enforcing a forfeiture of the membership to which it would legitimately succeed. Thus destroying the mortgage's rights therein—supposing such original membership, thus sought to be forfeited, was chargeable with the mortgage lien of the first deed of trust.

It having been established that the membership now in use of the Dispatch Publishing Company, (or its successors) is the identical membership acquired by it as the successor in the ownership of the St. Louis Dispatch newspaper, let us recur once more.

First, to the nature of these memberships and their modes of transfer, with a view to determine whether or not the lien sought to be fixed upon the membership held by the St. Louis Dispatch Company was in any manner enforceable, and if so, how?

It being quite apparent, under by-law XII, at least, that "any member selling or transferring his membership, *may* transfer his certificate of stock to the purchaser or successor in the ownership of the newspaper, and it shall then be the duty of the secretary upon request to transfer the same," &c., "to such purchaser," &c., it would seem to

follow that such member could both *agree to sell his membership and agree to transfer his certificate of membership to such purchaser. It therefore follows that he can sell his membership when and at the time he sells his newspaper.*

It will not be disputed that a newspaper is property capable of sale, and if of absolute sale of conditional sale also, and therefore the proper subject of mortgage. It it may be mortgaged once, it may be mortgaged subject to a prior one, and so may be sold subject to an existing mortgage or mortgages. There were two deeds of trust upon the *St. Louis Post Dispatch* newspaper prior to 11th December, 1889; the second having been made subject to the first, and both purporting to convey, along with the newspaper, to the trustee in each deed named, the membership in the Western Associated Press. The certificate of membership was at the date of the first mortgage or deed of trust *assigned for the purposes of the deed of trust to Henry L Sutton, as trustee in said deed,* and *remained in his hands thereafter,* but, in such words that by no possibility could any title to the membership have been divested out of the St. Louis Dispatch Company, until a forfeiture and sale of the ' newspaper ' under said deed of trust, when under the power of sale with which the deed invested him, the trustee could have sold and passed title to the ' newspaper ' and at such sale delivered to such ' purchaser and successor in the ownership of ' said ' newspaper ' the certificate of membership; thus enabling such ' purchaser,' &c., to comply with the requirements of by-law XII and of becoming 'a member with the same rights and privileges as the original member.' The assignment of the certificate being purely conditional upon a forfeiture under the deed of trust and to enable said trustee to pass the legal title to it and the newspaper, under the terms of his power, it follows that the assignment could not be com-

pleted except by the forfeiture and by the exercise of the powers of the trustee under the deed.

The sale, therefore, under this first deed of trust, of the St. Louis Dispatch newspaper and membership by the trustee after forfeiture, would have passed the title to the purchaser as previously explained, and given the mortgage the benefit of the market or selling value of a membership in the City of St. Louis. In other words, this deed of trust and accompanying assignment of the certificate, charged the membership in conjunction with the newspaper with the lien of the mortgage, and made the effectuation of such lien, in conformity with the by- laws affecting its sale and transfer, practicable and even easy. The lien therefore sought to be charged upon the membership was capable of effectuation, and the membership was in connection with the newspaper affected with the mortgage lien for the payment of the mortgage debt. This is a corrollary from the proposition that 'any member' selling or transferring his newspaper may transfer his certificate of stock to the purchaser or successor in the ownership of such newspaper, and it shall be the duty of the Secretary upon request, to transfer the same on the books of the Association to such purchaser or successor, who shall then subscribe to 'the articles of Association and by-laws and become a member with the same rights and privileges as the original member.'

In other words, if the newspaper and membership could be sold together they could be mortgaged together. Therefore:

The membership, in conjunction with the newspaper, was mortgageable and saleable under the mortgage.

The saleability and consequent mortgageability of the membership in conjunction with the newspaper being unquestioned under the by-laws, it certainly ought not to make any difference to us if the Dispatch Publishing

Company did not exactly comply with the requirements of the by-laws of the Western Associated Press in reference to its acquisition of this membership. It is of course true that the Dispatch Publishing Company acquired its title to the newspaper and its right to membership under a title under a second deed of trust expressly subject to a first; that at the sale under the second deed, the certificate was in the possesson of the Trustee in the first deed of trust *for the purposes of that deed*; that by virtue of its purchase of the St. Louis Dispatch newspaper, subject to said first mortgage, it *used* the membership in the Western Associated Press, remaining standing in the name of the St. Louis Dispatch Company, for more than a year after such purchase; and continued to use the same 'membership' after it had procured the placing of its own name as member, as purchaser and successor in the ownership of the St. Louis Dispatch newspaper.

If it be true therefore that it did purchase the St. Louis Dispatch newspaper and membership subject to a prior mortgage, then it would follow that said St. Louis Dispatch newspaper and the membership acquired in conjunction with its sale, would still be liable to sale in its hands in the same manner as it would have been in those in the St. Louis Dispatch Company, and the title to the membership would follow the title to the newspaper, *in whose name soever on the Books of the Association it stood and by whatsoever certificate represented.* Otherwise it must be held that this transfer of the membership on the books of the Company to the Dispatch Publishing Company,the "purchaser and successor in the ownership" of the "St. Louis Dispatch Newspaper" subject to a prior mortgage, would destroy the lien upon the membership sought to be imposed by the first mortgage,whilst leaving the newspaper itself in its hands still thereby affected.

In other words that the "purchaser,etc."of the newspaper, subject to first mortgage could prevent the mortgagee in the first mortgage from passing title to the membership upon; a sale of the newspaper and membership thereunder when such purchaser acquired title to the newspaper and the membership subject to the rights of prior mortgagees. Now whilst it might be conceded that the purchaser of the newspaper and membership subject to a prior deed of trust,had by its procurementof the issuance to itself of a new certificate and its name to be placed upon the association books as purchaser of former member's newspaper—made it practically impossible to procure the transfer of the membership standing in the Dispatch Publishing Company's name upon the books, by the mere sale of the newspaper and rights to the membership under the power in the deed, and the transfer of the St. Louis Dispatch Co's. certificate of membership to the purchaser at such sale, without a direct suit against the Western Associated Press and the Dispatch Publishing Company. Still nothing stands in the way of the divestiture of this membership, out of the Dispatch Publishing Company, under a decree of sale under the first mortgage of the newspaper and membership, acquired by defendant as "purchaser and successor in ownership" of the newspaper subject to said first mortgage, being the identical membership acquired as purchaser under said second mortgage, *in whose name soever now such membership stands and by whatever certificate represented.*

This suit is for the foreclosure of property purchased by the Dispatch Publishing Company subject to this very deed of trust, and now in its hands, and hence it is not necessary to add the Western Associated Press as a defendant—because a decree of sale hereunder of the newspaper and the membership and the certificate of the

Dispatch Publishing Company in lieu of the former certificate and sale thereunder, would put the purchaser in as good a position to have his or its name placed upon the books of the Association as if the Dispatch Publishing Company itself would sell the newspaper at private sale and transfer the certificate of membership in the Western Associated Press to the purchaser of such newspaper. *We have and desire no concern with the Western Associated Press;* The only question is, will a court of equity effectuate the lien sought to be placed upon this newspaper and this membership by decreeing the sale of each in the hands of a purchaser subject to and having complete notice of the prior mortgage lien attaching thereto.—That is, decree a sale of the newspaper and the certificate of membership held by the Dispatch Publishing Company in accordance with the terms of the first deed of trust, so that the purchaser of such newspaper and certificate of membership and membership—may become the transferree on the books of the Association, as successor in ownership of the (mortgaged) newspaper, and by signing the articles of Association and by-laws become a member with the same rights and privileges as the original member.

But the defendant will probably seek to toss us aside upon one or the other horns of an alleged dilemma, in which it perhaps conceives we are placed. It may admit that the membership is saleable, and that any person selling or transferring his newspaper may transfer his certificate to the purchaser of the newspaper, but assert that it never acquired such certificate, and on the contrary this certificate is outstanding in our hands at this time. This brings us face to face with a serious difficulty brought about, as alleged in the bill, directly by the Dispatch Publishing Company's jugglery and deceit. The legality or illegality of the act of the Western Associated

Press is not in question. Undoubtedly our way would have been clearer had it refrained from the issuance of the second certificate until the presentation of the 1st for cancellation, and unquestionably has this act of the Western Associated Press enabled defendant to present an argument derived from situations altogether anomalous and never contemplated by the by-laws of the Association. But the undisputed fact that the certificate held by the Dispatch Publishing Company was issued to it as successor in the ownership of the St. Louis Dispatch newspaper, makes it clear that the Dispatch Pub. Co. made some representation to the Association accounting for its failure to present it; and the facts set out in the bill prove that the representations, upon which the second certificate was issued and the name of the Dispatch Publishing Company placed upon its books were and must have been false or fraudulent. But whatever the representation made by the Dispatch Publishing Company, the Western Associated Press treated the old certificate as if *lost or destroyed and did issue the certificate now held by the Dispatch Publishing Company* in lieu of such former certificate and in right of the Dispatch Publishing Company's alleged successorship in the ownership of the St. Louis Dispatch Company.

All we ask, therefore, is the sale of the certificate representing the membership acquired by the Dispatch Publishing Company as transferree of the St. Louis Dispatch Company and as purchaser or successor subject to said first mortgage, in the ownership of the St.Louis Dispatch newspaper. The certificate representing this right could be decreed to be sold in conjunction with the newspaper—and the purchaser of the 'newspaper' under this mortgage and the certificate of membership in conjunction therewith would be in a position to apply for a transfer and become a member in all respects as the

original member. If the Dispatch Publishing Company has succeeded to our membership, we will ask the sale of that certificate which will enable us most quickly to realize upon that membership, viz: The certificate issued in lieu of the one transferred to Sutton, and if that is done no necessity would ever arise for any dispute or controversy with the Western Associated Press in reference to the validity or invalidity of its act in issuing one certificate for a membership, when another certificate for the same membership was outstanding, uncancelled and unrepresented for cancellation. If we realize on the membership, and through the aid of the Court pass title to the certificate last issued, the Court could at once, in furtherance of the complete divestiture of title and in the exercise of the native jurisdiction of equity, decree the cancellation and surrender to the Western Associated Press of the old certificate, to which then, the office of the old certificate being ended, we could and would interpose no objections.

Nor does it make any difference *how* the Court accomplishes the result after which we are striving, viz: The divestiture of the membership and its investment in the purchaser at a foreclosure sale. If it should appear, in considering other phases of the controversy as they arise, that the newspaper now published by defendant is not the identical newspaper mortgaged—or for the reasons alleged is not to be conclusively held to be the same; and it should now appear necessary for the effectuation of this lien fixed upon this membership (subject to which idefendant purchased) to sell the newspaper in connection with which it is now used, certainly defendant should not be allowed to object, if, in the first place, it destroyed the newspaper in connection with which it acquired this membership, with notice of the lien attaching to it; and, if in the second, there is no other method of passing title to this membership than by the sale of the newspaper in con-

nection with the publication of which it is held and used. The membership, within the meaning of the decisions, we have cited *in extenso*, was a very valuable property-right and was property. As such it is saleable and was chargeable in equity with the lien of this mortgage. It was acquired by defendant itself at a sale under a second mortgage subject to the one we are seeking to foreclose. To say that defendant can escape scott-free with this membership by changing the name of the publication, is only to deny that the membership can be successfully charged; or at least it is to point out the way by which a dishonest purchaser may thwart a court of equity in its attempt to make good by its decree the express agreement of the mortgagor to deliver to the mortgagee this membership. Defendant took it *com onere*. It acquired it with a newspaper. Shall defendant defeat our claim to it, even if the mortgage under which we proceed does not cover the newspaper it publishes and in connection with which it holds, uses and enjoys the fruits of this membership? We do not believe it, and ask that the Court decree the sale of the newspaper in conjunction with the membership, if the sale of the former is necessary to make effectual the lien upon the latter.

Membership as to Parties.—"It is sufficient to say as to the last point, no relief is sought against the Board of Trade. The contest is purely between plaintiff in error and defendant in error, and in nowise concerns the Board of Trade. It will be time enough to make it a party when a decree is sought against it. Whether the party to whom the defendant in error desires the certificate to be assigned will be acceptable to and received by the board, cannot, in any possible way, concern the plaintiff in error."

Weaver vs. Fisher, 110 Ills., 146.

It is clear in the case at bar that if the Court holds the membership now in use by the defendant affected in equity with the lien of our mortgage as being the same membership sought to be charged therewith—all the Court can do will be to order the sale of the certificate it now holds either in or not in conjunction with the St. Louis Post Dispatch newspaper, and the question of the purchaser's right to have a new certificate issued to it upon presentation of the certificate now held by the Dispatch Publishing Company for cancellation, and to have his name placed upon the books of the Association as a member upon signing the by-laws, *might* then arise between such purchaser and the Association but *not* until then.

SUBDIVISION-CORROLLARY (B) TO PROPOSITION I.

Good will as Property Newspaper 'Good will' in Particular.

I.

'Good will' is, in general, property; and may be mortgaged, sold or bequeathed, in connection with the subject, which gives it its quality as property.

Churton vs. Douglas, Johns Ch.; 174.
Am. Encyc. Law, (Good Will) 1371.
Sebastian on Trade Marks, 329, 335 and cases.
Allan's 'Law of Good Will.'
Ibid.

II.

A newspaper publication is property and alone and distinct from a newspaper plant, is saleable and mortgageable.

Boon vs. Moss, 70 N. Y., 473-4.
Sebastian on Trade Marks, 317.
Am. and Eng. Encyc. Law, 1370, 1371 and 1372.

Sebastian on Trade Marks, 327 and cases cited.
McCormick and Cornie vs. McCullum; Ct. of Sess. Cas., 1st, Ser. Vol. I, page 496 and notes.
Edinburgh Newspaper Correspondent, Ct. of Sess. Case 1st, Ser. Vol. 1, page 409.
Dayton vs. Wicks, 17 How Prac., 510 and 511.
Bradbury vs. Dickens, 27 Beavan, 61.
Ex parte Foss, 2 DeGex and Jones, 329.
Longman vs. Tripp, 5 Bosanquet and Fuller, 67.
Allan's Law of Good Will.

III.

It is known and identified by its name and it passed under the phrase 'Good will of the St. Louis Dispatch Company." The name and good will of a newspaper are identical; the circulation and advertising patronage being the product of the good will, passes by the sale of the good will.

Ibid.

IV.

The sale of a newspaper is analogous, if not identical, with the sale of a trade mark or trade name; it is a sale of a certain publication having a specific name.

Churton vs. Douglas, 1 Johns, 174.
Sebastian, 323 and 324.

V.

Hence it is subject to much the same incidents as trade marks or trade names, and such an imitation as would constitute an infringement of a trade mark or trade name, whereby the complete enjoyment of the advantages arising from the use of the name of the one first adopting it, would be impaired or destroyed, would, in the same manner, constitute an infringement of the name of the

newspaper—which is in truth its trade name, as it is its sole means of identification as a property.

Ibid and Sebastion, 274-276.
Leonard vs. White's Golden L. C. 38 Fed Rep. 922.
Menendez vs. Holt, 128 N. Y,, 522.
Sebastian Trade Mark, 323 and 324.
Peltz vs. Eichele, 62 Mo. 179.
The American Brewing Company vs. St. Louis Brewing Company,47 Mo. App. 20, 21 and 22.

And therein of the estoppel to deny the identity of the two newspapers because of the similarity of names—in analogy to trade mark cases, trade name cases, etc.

VI.

Confusion of Chattels.

Wherever one wilfully confuses the goods of another with his own, in such manner as to render them indistinguishable or incapable of severance into their original form, so that the owner can not get either his property or his proportionate share in property, like in value and quality—the court will order the sale of the whole; and the lien of a mortgage will attach to the whole.

Burns vs. Campbell, 71 Ala. 278.
Adams vs. Wilde, 407 Mass. 125.
Krueger vs. Cooney, 45 Md., 593-4.
Hart vs. Ten Eyck, 2nd Johns Ch., 108.
Dunning vs. Stearns, 9 Bart., 634.
Robinson vs. Holt, 39 N. H. 563-4 and cases cited.

VII.

The good wills of the St. Louis Dispatch Company and the Dispatch Publishing Company were inextricably and wilfully confused and commingled by the consolida-

tion of the St. Louis Dispatch with the Evening Post, so that it could never be determined, with accuracy or even approximately, to the use of which of the two names in the publication was attributable its present or past circulation and advertising patronage: and hence the two publications are absolutely inseparable into their original forms; and being thus confused, the publication as it stands must be sold to satisfy the mortgage existing upon the St. Louis Dispatch at the time it came into the hands of the Dispatch Publishing Company.

VIII.

And more particularly does equity demand this remedy in this case, because it is reasonably certain, that, by reason of the ownership and acquisition of the ownership of the St. Louis Dispatch, in CONJUNCTION WITH A MEMBERSHIP IN THE WESTERN ASSOCIATED PRESS, the chief value attached and attaches to the name St. Louis Dispatch in the present publication

The Change or Variation of the Name of the 'Newspaper Mortgaged.'

Two newspapers, let us assume, are merged into one. The mortgaged newspaper called the *St. Louis Dispatch*, was purchased by Joseph Pulitzer—who, with John A. Dillon, the publisher and owner of the *Evening Post*—organized and became chief stockholders in the Dispatch Publishing Company, whereupon the latter company began the publication of the *St. Louis Post-Dispatch*. The *Evening Post* was about three or four months old; the *St. Louis Dispatch* began publication in the '50s. The *Evening Post* had no printing office, no type, no presses —nothing appertaining to the physical work of publishing a newspaper; the *St. Louis Dispatch* had a fully equipped printing and publishing department, with presses, type,

galleys, &c., &c., as heretofore explained. In a word, the *Evening Post* had no corporeal property, and no facilities for publication; it was made up in some way and the type-work, printing, &c., done elsewhere. It had no membership in the Western Associated Press and no special facilities, telegraphic or otherwise, for the acquisition of foreign or outside news; the property acquired by the Dispatch Publishing Company by mesne conveyances from the St. Louis Dispatch Co. by the sale under the second mortgage, subject to the first mortgage—was a newspaper —long established, and a fully equipped newspaper plant. The newspaper, as a property, consisting of the name *St. Louis Dispatch* and the good will attaching to such name. The good will of a newspaper may be definned as or measured by its circulation and advertising patronage; the former indicated by its current daily sales and its subscription lists, and the latter by its advertising contracts. Without any reference to the corporeal or physical properties, which go to make up what we have called a newspaper plant—and taking into account only the newspaper itself, its name and good will, it is obvious that the newspaper possessing the best and most numerous facilities for acquiring 'news' would have that which would naturally tend to enhance the value of its good will, viz., the increase of its circulation among readers and its consequent increased value as an advertising medium.

In this very connection we may recur to the fact that the Dispatch Publishing Company acquired and used, as we have heretofore very fully explained, the membership in the Western Associated Press as (subject to the mortgage here in question) the purchaser and successor in ownership of the St. Louis *Dispatch* newspaper. The valuable nature of this membership, the extraordinary facilities of the W. A. P. for acquiring and furnishing news to its members at a very small cost (altogether out of reach of

the non-member) has also elsewhere been fully explained, and it is now referred to only as showing that this membership is an essential element in estimating the relative value of 'good wills' aside from the question of the market value of the membership itself. We are aware that in all enterprises individual effort and talent are indispensable; but it is likewise true, the enterprise is more likely of success if the means are ready to hand. *The means*, in the present instance, were *all* acquired by the Dispatch Publishing Company from the St. Louis Dispatch Company, *subject to our mortgage*. If the several good wills attaching to the several names *Post-Dispatch* defined by and measured as the proper circulation and advertising patronage of each, were severable, so that it would be practicable to sell and convey under this deed of trust the St. Louis *Dispdtch* newspaper in its distinct form, and the purchaser could acquire thereby the circulation and advertising patronage exactly appropriate to the use of its name, then the situation would present less difficulty. But, as the contrary is true, and the several good wills of the Evening *Post* and St. Louis *Dispatch* are unseverable and absolutely incapable of disconnection in such a manner as to determine the part each 'name' had in creating or maintaining such circulation and advertising patronage it now has or ever had, the simple and the obvious thing to do, with the view of foreclosing the mortgage on the good will acquired from the St. Louis Dispatch Company is to sell the good will and name, St. Louis *Post-Dispatch*.

This is necessary to effectuate the sustenance of the mortgaged 'good will' and to foreclose the mortgage thereon. If this is not done, it will result that the mortgages on the newspaper will be defeated by the merger of the two, where each owner had full notice of the

lien of the mortgage on the 'good will' of the St. Louis *Dispatch* newspaper, and expressly subject to which Joseph Pulitzer and the Dispatch Publishing Company had bought.

Of course such a defeat is not reconcilable either with reason or justice, and if it came about at all, the Court could only say that no adequate equitable remedy existed to meet such a hard case as this. But we would not alone lose our right to realize by foreclosure upon our newspaper, but likewise would the membership in the Western Associated Press be incapable of sale, if the Court should conclude that it is only transferable by a member selling his newspaper, or from a member whose newspaper is sold to this "purchaser or successor in the ownership of such newspaper." This of course is the consummation sought by the Dispatch Publishing Company. But our contention is that a newspaper—its good will and name—the circulation appendant to it at the time of the sale and its advertising contracts —is saleable; and that with the good will and name is carried whatever circulation and advertising patronage may subsequently accrue from its use. If it is saleable, it is mortgageable. The "good will" of the newspaper is its tangible property element and passes by its name. In this case it was acquired by defendant Dispatch Publishing Company under a second mortgage and subject to the one we are seeking to foreclose. This "good will" became part and parcel of the publication issued by the Dispatch Publishing Company, under the name of the St. Louis Post-Dispatch, incapable of exact separation and identification, or valuation. The good will with which it was, so to speak, commingled and confused, was probably of little value as explained, but its value could not be exactly ascertained, however insignificant, because it is equally impossible of exact separation and

identification. Of this we may be certain—that the circulation and advertising patronage of the St. Louis Dispatch was large and that of the Evening Post very small. The membership in the Western Associated Press gave a very large value to the good will attendant upon the use of the name of the St. Louis Dispatch, whilst the absence of any special news facilities equally detracted from the value of the good will of the Evening Post. We might very rationally argue that these conditions continuing fixed the relative values of the several names and good wills, after as before the publication of the two newspapers under one name.

This brings us to a brief consideration of the nature of good will as property in general, and of the good will of a newspaper in particular.

The value of a newspaper is its good will—which attaches to its name. It is therefore the only element of property in the publication, being that upon which alone it depends for its circulation and advertising patronage—the only source of income to a newspaper publisher. This good will therefore does not grow out of or attach to a particular place of business or publication, in the city, town or county in which it may be published. The property element of a daily newspaper is its good will—the circulation and advertising patronage attaching to the name of the publication. Most of the confusion existing in the discussions concerning the legal incidents of good will arise from a failure to apprehend its simple and fundamental meaning. The definition given by Judge Story is comprehensive enough and is generally adopted. It (good will) is not always, as it has been said, a thing of value or a tangible property. In a commercial sense, it is nothing more than the kindly or friendly feeling existing, in any community, towards any firm, corporation or individual, conducting any species of business or occupation, to

the conduct or pursuit of which a money value attaches. This public complacency or kindly feeling may result from the fact that a certain business stand, where goods, wares or merchandize of any kind are dealt in, has remained at one particular spot in some street in a city, town, or some particular portion of some county road; but more often does this good will attach to the name of the individual, firm or corporation, conducting the business, or to some trade mark or trade name in use by it. But it is obvious that we must look to the nature of the business to discover wherein its good will consists, or, in other words, what is the special feature of it that attracts and holds public patronage. The name of the newspaper is its means of identification, and its trade mark or name. The number of its office or place of publication in a city in which it is published is a mere incident of its publication, and is a matter of no possible concern to its readers. If it changed its abiding place ten times a year, such change would not necessarily affect the number of its sales. The *New York Times*, *Herald*, or *World*—as newspapers—for value depend upon the several names—this is the property element in them—for upon the name and attached to it is the circulation and advertising patronage, subscription lists and advertising contracts. The good will and name of the newspaper are therefore identical—the name being the stamp or mark which makes the newspaper valuable, and determines the value of the good will.

Whenever the complacency, kindly or friendly feeling, manifests itself towards any individual firm or corporation, resulting in public patronage to such individual, firm or corporation, conducting any species of trade, it is called good will and is property. If it is manifested towards a name of a book, or a periodical, or a trade mark, or a daily newspaper, or an hotel—it is the good

will of the public towards the article, or product, or place possessing such name, and is property. It may be sold or mortgaged, as illustrated in the name of "HOUSEHOLD WORDS," which was sold alone, under a decree of court, and brought $15,000.00. Also in the constant sale of trade marks, copyrights, etc.

Again, newspapers are sold every day and mortgaged also, and it would be absurd if any one would seriously contend that it would be necessary to sell a printing and jobbing house, with the newspaper -as if the newspaper depended for its life upon the ownership of a printing house, unless it be assumed that no facilities for procuring publication of the newspaper exist, and it is wholly dependent upon some identical PLANT for publication. Such a contention carries with it its own contradiction, and is manifestly absurd. The good will attaches to the name of the newspaper, and its product *is its subscription list and advertising contracts—its circulation and advertising patronage*. It is both saleable and mortgageable.

Good Will in General.—"Good will connected with any trade or occupation is a valuable right, and may be made the subject of barter and sale."

Am. Encyc. Law, 'Good Will,' 1371.

"Good will, I apprehend, must mean every advantage, every positive advantage, if I may so express it, as contrasted with the negative advantage of the late partner not carrying on the business himself, and that has been acquired by the old firm in carrying on its business, whether connected with the premises in which the business was previously carried on or with the name of the late firm, or with any other matter carrying with it the benefit of the business."

Churton vs. Douglas, 1 Johns., Ch. 174.

"Previously to the case of Churton vs. Douglas, the

language of various eminent judges as to what constituted 'good will' had rather tended to connect the good will with *the premises* on which the business was carried on *than with the business carried on there*, probably because that language, though in general terms, was directed to the circumstances of the case then in course of decision.

"Thus, Lord Eldon, C., in Crutwell vs. Lye., 17 Ves., 335, describes good will as 'nothing more than the probability that the old customers will resort to the old place.' Leach, M. R., describes it (in Chessiem vs. Dewes, 5 Russ. 29) as 'an advantage attaching to the possession of the house' in which the business had been carried on; and Lord Langdale, M. R., (in England vs. Downs, 6 Beav. 269), as 'the chance or probability that custom will be had at a certain place of business in consequence of the way in which that business has been previously carried on."

Sebastian on Trade Marks, 328.

"The judgment in Churton vs. Douglas, has now established that the dictum of Lord Eldon in Crutwell vs. Lye, must be read as meaning that *good will is the probability that the old customers will buy the old goods from the old firm or their successors in business, whether the means of identification be the place of business or otherwise.*"

Sebastian on Trade Marks, 329.

The author then instances good will of public houses as 'trades' in which "there can hardly be any good will apart from the premises in which business has been carried on. In such a case the good will is the mere habit of the customers resorting to the house."

Ibid, 329.

"The good will of a trade," said Tindall, C. J, (in Hitchcock vs. Coker, 6 Ad. & E., 438–54), "is a subject of value and price. It may be sold (see Darby vs. Whit-

aker, 4 Dr., 139; Churton vs. Douglas, 1 Johns., Ch. 174; Corker vs. Hood, 26 Beav, 293; Hudson vs. Osborne, 39 L. J., Ch. 79; Shipwright vs. Clements, 19 W. R., 599; Howe vs. Searing, 10 Abb. Pr. 264; R. Cox, 244, bequeathed (see Keane vs. Harris, 17 Ves., 338; Robertson vs. Quiddington, 28 Beav., 529), or became assets in the hands of the personal representative of a trader' (Woods vs. Hand Peake, 105; Dakin vs. Cope, 2 Russ, 170; Chissem vs. Dewes, 5 Russ., 29; McCormick vs. McCubbin, Ct. Sess., Cas., 1st Ser., I., 541)"; A sale may be conditional (Boon vs. Moss, 70 N. Y., 465), and may be 'effected by a mortgagee (*Ex parte*, Punnett; *in re* Kitchen.) Though incapable, by reason of its incorporeal nature, of seizure by a sheriff (*Ex parte* Foss, 2 DeG. & J., 230; Hilmore vs. Smith, 35, Ch. D., 436), good will is goods and chattels within the bankruptcy acts (Longman vs. Tripp, 2 Bos. & S. N. R., 67; *ex parte* Foss, *supra*), and may be dealt with by the trustee in bankruptcy first as the bankrupt's other property. (See Hudson vs. Osborne, 39 L. J., Ch. 79; Hegeman & Co. vs. Hegeman, 8 Daly, 1; Iowa Seed Co. vs. Dorr, 70 Iowa, 481). It is also property within the Stamp Act (Potter vs. The Commissioners of Inland Revenue, 10 Ex., 147; and see Morgan vs. Perharnus, 36 Ohio St., 517.

"The valuable character of good will is not confined to a few trades, but is recognized throughout the commercial world. Thus among the cases on this subject which come before the courts, instances are to be found in which the traders were public housekeepers, brewers, bankers, tailors, mercers, dyers, milliners, upholsterers, pencil-makers, tobacco-brokers, snuff-makers, paper-makers, provision merchants, cheesemongers, glass-blowers, glass-stainers, manufacturing chemists, commission agents, ironmasters, carriers. *The good will of a newspaper or magazine*,

consisting of the right to use the title under which reputation has been acquired by a publication, is another instance of valuable good will."

Ibid, 335.

The general definition of good will given by Judge Story is sufficiently explicit. He says: "This good will may be properly enough described to be the advantage or benefit which is acquired by an establishment beyond the mere value of the capital stock, funds or property employed therein, in consequence of the general public patronage and encouragement which it receives from constant or habitual customers, on account of its local position or common celebrity or reputation for skill, or influence or punctuality, or from other accidental circumstances or necessities, or even from ancient partialities or prejudices."

The good will of a newspaper establishment often constitutes its largest value. A majority of the subscribers are generally permanent. They become attached to the paper on account of its sentiments, whether political, religious or literary, and the ability and energy with which it is conducted. The habit of reading a particular paper periodically seems to stimulate a desire for its continuance. Subscribers once obtained, are permanent customers, not only for the paper, but for advertising and job work. There is one kind of good will which has been said to be only a probability that customers will resort to the old place; and another, far more valuable, when a retiring partner agrees not to engage in the same business in competition with the old establishment. The *good will of a permanent newspaper establishment* is generally far more tangible than either. The vendee Hall would not have been permitted to appropriate the subscription list and *name* of the paper to his own use for the reason that he

had sold it, although he might, perhaps, have printed another newspaper at the *same place*. The subscription lists are in effect contracts to buy the paper for a specified time, or indefinitely, and belong to and go with the establishment. The rights and privileges which go to make up the good will of such a concern is *property*, although incorporeal in its nature. These views accord with the authorities. (Story on Partnership, Sec. 99, Notes and Cases Cited; 17 How., 410; 4 Paige, 479; 4 Sand., Ch. R., 405.)"

Boon vs. Moss, 70 N. Y., 473–4.

"The rights which are possessed by the owner of a magazine, newspaper or other literary publication, are of a very similar character to those which a person has in the good will of a business carried on by him, just as a name affixed to a shop conveys to the customers the idea of a certain degree of excellence, with which the articles sold by the person using that name are associated in their minds; so the title prefixed to a periodical, or its general appearance, conveys to those who take it up the impression that the contents of the publication will be found to be up to the standard to which former editions of the simulated publication have attained. Like goods bearing a trade mark, literary publications carry with them wherever they go the guarantee for their quality, and the representations conveyed by their titles are made to all into whose hands they may come, not merely to the original purchaser."

Sebastian Law of Trade Marks, 317.

"The good will of a business is frequently of no value at all except in connection with the place of business; this, however, is by no means always the case. The value of the *good will of a newspaper*, for example, attaches to its name, and is scarcely, if at all, dependent on

the place of publication. (2 Lindley on Partnership, (Ewell) 860.)"

Am. Encyc. of Law, 1372.

"The whole in a substantial part of the trade may consist of good will, leaving the renewal of contracts with the old connection of the firm unaffected; in such case the good will is the identical source of profit which operates both before and after the dissolution."

Willett vs. Beanford, 1 Hare, 253.

Am. Encyc. of Law, 1371.

"An injunction will lie to restrain one person from assuming the name of another's newspaper to impose upon the public and to supplant the latter person in the good will of his paper. (Bell vs. Lock, 3 Paige, N. Y. 75."

Am. Encyc. of Law, 1370.

"It seems there may be cases in which a contract for the sale of a good will would be specifically enforced, the business and good will being included together, though there was no such dependence on the business premises. Such would be the case with the good will of a quack medicine or a *newspaper which is practically independent of locality*. The connection between *the business and the good will* is such that the sale of the business, or of a share in the business, as a going concern, carries with it the good will, even without its being specifically mentioned, and so does the sale of a hotel or a public house. And if the good will is sold *the trade name* goes with it."

Sebastian on the Law of Trade Mark, 329.

See Bryson vs. Whitehead, 1 S. & S. 74.

Llewellyn vs. Rutherford, L. R. 10 C. P. 456. (Per. Britt. g.)

Snowden vs. Noah, Hopk. 347, R. Cox. 1.

"Their Lordships were agreed that the copyright or

good will of a newspaper is a valuable privilege or property, transmissible *inter vivos*, or to heirs; and that if, no the dissolution of the company, the surviving partners be desirous to continue the newspaper, but refuse to buy it, then, like the other rights of the deceased in the dissolved company, it must be sold for behoof of his representatives."

McCormick & Carnie vs. McCubbin et al. Court of Sess. Cas. 1st Ser. I. 496. See note to this case.

The reasoning of the learned judges is both quaint and sound, and I take the liberty of quoting their opinions at length:—

McCormick & Carnie vs. McCubbin and others, Court of Session Cases, 1st Ser. Vol. I., p. 496:

Lord Robertson:—"I do not think that there is any difficulty in this case. McCormick & Carnie carried on business with Wilson as booksellers, printers and stationers, and were printers and publishers of the newspaper called the Ayr Advertizer. There was no contract of partnership; and McCormick and Carnie were not original proprietors, but acquired Paul's share for valuable consideration. Wilson dies, and leaves his share of the newspaper to be sold, but the first offer to be made to McCormick and Carnie. They decline to accept, and set up a plea that this is a right which Wilson could not transmit to his representatives; and now they offer a bill of suspension and interdict against a public sale. But the right of publishing a newspaper is often one of great value, and McCormick & Carnie can not well dispute that *it is a valuable right, and which the holder may sell in the market*. But they maintain that it is one of such an anomalous nature that, so soon as the holder dies, his representatives cease to have any interest in it; that he has merely a life interest, and that his share accresces to

the other shareholders. It may be true that a partner cannot be obtruded on them; but this is a right of common property, and cannot expire at the death of the proprietor. I am, therefore, for refusing the bill."

Lord Craigie:—"I concur in substance, but perhaps not on the same grounds. The rights of the parties must be judged of as at Wilson's death. The parties were engaged in one common business, and the publication of the newspaper was a part and pertinent to it. It is competent for the representatives to do what the deceased might have done. I think that there should be a common manager, and that the respective rights should be ascertained in a declarator; but I would refuse the interdict, for the surviving partners can never pretend that they have right to Wilson's share. His interest is more of the nature of privilege or benefit, than a copyright."

Lord Glenlee:—"I do not inquire very curiously as to the accuracy and application of the terms copyright, common property, &c., but *there is certainly an advantage or source of gain connected with the establishment and publication of a newspaper.* It was not vested in any partner, but entered in the company; and now that the company is dissolved by the death of one partner, how can the other partners insist to have the exclusive right? Like everything else belonging to the company, it is common property, and if they cannot agree among themselves, it must be sold like the other *pro indiviso* rights of the co-partners."

Lord Justice Clerk:—"The question put to us is, *whether the right of publishing a newspaper is a mere ideal right? But this is absurd;* for, whether called copyright or property, or by any other name, it is clearly a valuable right and privilege, which may be sold and conveyed by will. In the other division they held, a few days ago, that a party, in right of the Edinburgh Corre-

spondent newspaper, had such a substantive right as to prevent any other person publishing a similar newspaper, *and yet we are told that this is not a right which can* be disposed of in the market, but must go to the surviving partners. I am quite clear that both the law and the equity of the case are against them."

Edinburgh Newspaper Correspondent, Court of Session Cases, 1st Ser., Vol. 1, p. 407:

"A case was reported by Lord Kinneder as to whether he should grant an interdict against the publication of a newspaper called the Edinburgh Correspondent. A paper had been hitherto published under the same name. The former proprietors objected to another being published under such title or appearance as might mislead the public regarding the identity of the new and old paper, as an infringement of their rights."

Lord Belgray:—"The partners under the existing firm as publishers of the former paper, have a right to prevent any paper from being published under such *title* or firm as may mislead the public into a belief that it is the former paper. In the case of Marshall it was found that no partner of a new establishment had a right to assume the old firm."

Lord Gillies concurred with Lord Belgray as to the rights of the publishers of the original Edinburgh Correspondent, who are entitled to have an interdict against the publication of the present paper under the *same name*, until the publishers of the new paper choose to make such arrangements as shall remove all doubt regarding the identity of the two. It is quite impossible to make out (as the counsel for the publishers of the new paper contend) that the new paper is *not just an assumption of the good will which the old had with the public*. Their advertisement affords positive proof to the contrary. It states that

a contract has been made with a new editor. That it is hoped the 'character of the paper will be improved,' terms which could never be applied to a new paper. *The good will acquired by an established newspaper is a very valuable property.* In London it has been sold for £40,000.00 or £50,000.00. They are entitled to an interdict."

"*The valuable part of the partnership property* consists in the good will, so to term it, of the paper—that is, the celebrity which it has acquired under the name of Porter's Spirit of the Times, and the probability of that title continuing to attract custom. This value is partnership property, as much as the furniture of the office or a debt to the firm, and this must be protected and disposed of for the benefit of the creditors of the firm, or of the partners jointly * * * * * * * * * It has been very correctly argued by the counsel of the plaintiff that the analogy of the rules as to trade marks, should apply to this case. * * * The full protection of the property in the paper requires, however, that the receiver be empowered to carry it on until sufficient time is allowed to dispose of it advantageously."

Dayton vs. Wickes, 17 How. Pr. 510-511.

"The property in a literary periodical like this is confined purely to the mere title, and the title of the work is 'Household Words,' and that forms part of the partnership assets, and must be sold for the benefit of the partners, if it be of any value."

Bradbury vs. Dickens, 27 Beavan, 61.

"This right (says a note to above) was accordingly sold by auction on the 16th of May, 1889, and produced £3,550. The publication of 'Household News' thereupon ceased."

The distinction between the newspaper plant and the

newspaper is clearly made in the following cases, where also is equally well illustrated the nature of a newspaper and its dependence for its value upon its name

The Court says:

"The case, in the argument before us, was very properly divided into two questions: first, the question as to the right in the newspapers, and secondly, as to the right in the plant."

"As to the newspapers it was contended that they were not goods and chattels within the meaning of the 125th section of the Bankrupt Act, which provides for goods and chattels, of which the bankrupt is reported owner passing to the assignees. It was said that the right in a newspaper *was a mere right to publish the paper under a particular name*, and that such a right could not be considered as goods and chattels, within the meaning of the act. But, to say nothing of the copyright in the newspaper, which undoubtedly exists, the right of publishing a newspaper is a right to which an interest is attached. It is a right protected by Courts of Law and Courts of Equity, and therefore a proprietary right and the very newspaper acts on which the argument before us proceeded, treat the matter as a matter of property, and the right as being a proprietary right. I feel no doubt, therefore, that the property in these newspapers must be considered as goods and chattels within the meaning of the Bankrupt Act. These words, 'goods and chattels' are words of very extensive signification, and undoubtedly comprise both tangible property, and property which is not tangible. If there had been any doubt in my mind upon this point it would have been removed by the case of Longman vs. Tripp, which seems to me to be a decisive authority upon this subject, and to be well founded in point of law."

Ex parte Foss, 2 De Gex and Jones, 239.

The newspapers, *Morning Herald*, *The Standard*, and *The St. James Chronicle* passed to the assignee and *the plant* to the mortgagees.

See Longman vs. Tripp, 5 Bosanquet & Puller, 67.

"Where the *Bristol Mercury* was assigned in two moieties—neither deed including any presses, type or other implements for printing, but only the right of printing a newspaper, under the title of *The Bristol Mercury* in the manner above mentioned, etc.

"No affidavit or affirmation of the plaintiffs having became the proprietors or publishers of the said newspaper, or having purchased Bulgins' interest therein, was delivered to the Commissioner of the Stamp duties, or any of their offices according to the statute of 38 Geo. 3, c. 78. After making of the said assignments, that is, in the month of February, 1804, Bulgin became bankrupt, and his estate and effects were duly assigned to the defendants under a commission of bankruptcy, regularly issued and prosecuted. The newspaper was afterwards resold by order of the defendants, his assignee, and with the concurrence of the plaintiff. The question arose on the title to the fund. Held, that the newspaper was property, goods and chattels within the meaning of the bankrupt, act, and the title thereto passed to the assignees. The argument and opinion admitted the assignability of the newspaper by deed. The failure of mortgagee's title resulted from this failure to comply with the act of 38 Geo. 3, c. 78. The fourth section of which requires 'that as often as any of the printers, publishers or proprietors shall be changed, an affidavit or affirmation shall be made, containing the name, addition and place of abode of such printers, publishers or proprietors.''

Longman vs. Tripp, 5 Bosanquet & Puller, 67.

The failure of the mortgagees in the case of Morning

Herald, the Standard, and St. James Herald, to acquire title against the assignee in bankruptcy to the newspapers was attributable to a like neglect.

Estoppel to Deny the Identity of the Two Newspapers, because of the Similarity of Names in analogy to Trade Mark Cases.

Having shown that good will is property, and in particular that the good will of a newspaper is property, and that the good will of the latter is its name and the circulation and advertising patronage attaching thereto, let us return to our original inquiry concerning the effect of the change or variation in the name of the publication issued by the St. Louis Dispatch Company, and that issued by the Dispatch Publishing Company.

First. Was the use of the name *St. Louis Post-Dispatch* any change at all in substance; or a sufficient change to guard against misleading the public, and particularly the mortgagee, into the belief that the two were identical? and

Second. If the change was complete and sufficient and not such as to be likely to mislead third persons into confusing their identity, was not the use of the two names such a commingling and confusion, by the defendant—of a mortgaged with an unmortgaged good will—as to warrant, in a proceeding to foreclose, the granting of a decree of sale of the newspaper called the *St. Louis Post-Dispatch*, because of the impossibility of severing the two publications, in such a manner as to reinstate and sell them as separate publications? And first, the variation in the names was not a substantial change; or if change it was, emphatically not sufficient to guard against the mortgagee, and the public identifying the old and new publications as the same.

Defendant was, therefore, in analogy to trade mark cases, estopped to deny the identity of the two newspapers because of the similarity in the names.

Analogy to Trade Marks.

"The name of a firm is a very important part of the good will of the business carried on by the firm. A person says, 'I have always bought good articles at such a house of business. I know it by that name, and I send to the house of business identified by that name for that purpose.' There are cases every day in this court in reference to the use of a name of a particular firm, connected generally, no doubt, with the question of trade mark. *But the question of trade mark is in fact the same question.* The firm stamps its name on the articles. It stamps the name of the firm on each article as a proof that they emanate from the firm; and it becomes the known firm to which applications are made, just as much as when a man enters a shop in a particular locality; and when you are parting with the good will of a business, you mean to part with all that good disposition which customers entertain toward the house of business identified by the particular name or firm, and which may induce them to continue giving their custom to it. You cannot put it anything short of that. That the name is an important part of the good will of a business is obvious, when we consider that there are at this moment large banking firms, brewing firms and others in this metropolis, which do not contain a single member of the individual name exposed in the firm."

Churton vs. Douglas, 1 Johns, 174.

As quoted before in Dayton vs. Wicks, 17 How. Pr. 510-511, referring to the name of the newspaper, the court says "It has been very correctly argued by the counsel of the plaintiff that the analogy of the rules as to trade marks should apply to this case."

Upon the subject of infringement and by way of bringing the analogy between t rade marks or names more strongly before the court, we beg leave to add the following citations:

"It is now admitted on all hands that if a trade name is so imitated as to render deception probable relief will be granted, and the test of the infringement of a trade mark in which the right of property is undoubted, is the production of such a probability of deception." (Sebastian, page 274.)

Refers to Hall vs. Barrows, 4 De G. J. & S. 150.

"And in Singer Manufacturing Co. vs. Long, Lord Blackburn took the view that the law of trade marks and trade names *when not affected* by legislation was the same. Whether there is or is not property in a trade name, as Lord Blackburn suggested, it is a fraud on the part of one person to attract to himself the custom intended for another, by a false representation, direct or indirect, that the business carried on by himself is identical with that of the other person by whose ability and exertions the name has acquired the reputation it possesses. The question is not whether the defendant's business is represented as being similar to the plaintiff's, but *whether it is represented as being that very identical business*. If such a false representation has been made, whatever may have been the motive of the person making it, when proceedings are taken in consequence of it 'all the court requires is to be satisfied that the names are so similar as to be calculated to produce confusion between the two—so calculated to do it that, when it is drawn to the attention of those adopting the name complained of that that would be the result; it is not honest for them to persevere in their intention, though originally the intention might not have been other-

wise than honest.' (Hendricks vs. Montague, 17 Ch. D., 138.)"

Sebastian Trade Marks, 276.

"The defendant in this case has substituted its own name for that of complainant's in connection with the word 'valvoline' so that there is no pretense that the defendant is selling lubricating oils as the oils of the complainant, because it is clearly stated in their labels to be 'White's Valvoline Oil,' but that does not relieve the defendant. The authorities upon this point are numerous, but it is not necessary to refer to any other than the case of Menendez vs. Holt, 128 U. S., 514, * * which is the latest decision of the United States Supreme Court upon this subject." (Leonard vs. White, Golding L. Co. 38, Fed. Rep. 922.)

"Holt & Co. having acquired the exclusive right to the words 'La Favorita,' as applied to this particular vendible commodity, it is no answer to their action to say that there was no invasion of that right because the name of S. O. Ryder accompanied the brand upon flour sold by appellants, instead of the name of Holt & Co. That is an aggravation and not a justification, for it is openly trading in the name of another upon the reputation acquired by the device of the true proprietor. (Gillott vs. Esterbrook, 47 Barb. 455; S. C. 48 N. Y. 374; Coats vs. Holbrook, 2 Sandford Ch. 586.")

Menendez vs. Holt, 128 U. S. 522.

"In this case the court adopts the statement made in the case of Churton vs. Douglas, as to what constitutes good will. We beg the Court to bear in mind what we now quote when it comes to consider the plea of laches set up in defendant's demurrer: 'Counsel in conclusion earnestly contends that whatever rights appellees may have had were lost by laches; and the desire is intimated that we should reconsider McLean vs. Fleming, 96 U. S. 245, so far as it was therein stated that, even though a com-

plainant were guilty of such delay in seeking relief upon infringement as to preclude him from obtaining an account of gains and profits, yet, if he were otherwise so entitled, an injunction against future infringement might properly be awarded. We see no reason to modify this general proposition, and we do not find in the facts as disclosed by the record before us anything to justify us in treating this case as an exception. The intentional use of another's trade mark is a fraud; and when the excuse is that the owner permitted such use, that excuse is disposed of by affirmative action to put a stop to it. Persistence in the use is not innocent; and the wrong is a continuing one, demanding restraint by judicial interposition when properly invoked. Mere delay or acquiescence cannot defeat the remedy by injunction in support of the legal right, unless it has continued so long and under such circumstances as to defeat the right itself. Hence, upon an application to stay waste, relief will not be refused on the ground that as the defendant had been allowed to cut down half of the trees upon complainants' land, he had acquired by that negligence the right to cut down the remainder. (Attorney General vs. Eastman, 11 How., 205.) "Nor will the issue of an injunction against the infringement of a trade mark he denied on the ground that mere procrastination in seeking redress for depredations had deprived the true proprietor of his legal rights. (Fullwood vs. Fullwood, 9 Ch. D., 176.) Acquiescence to avail must be such as to create a new right in defendant. (Rogers vs. Arwill. 3 De G. M. & G., 614.) "Where consent by the owner to the use of his trade mark by another is to be inferred from his knowledge and silence merely, 'it lasts no longer than the silence from which it springs; it is in reality no more than a revocable license." Duer J. Amoskeag Mfg. Co. vs. Spear, 3

Sandford (N. Y.) 599; Julian vs. Hoosier Drill Co., 78 Ind., 408; Taylor vs. Carpenter, 3 Story, 458; S. C., 2 Woodbury and Min., 1: "

Menendez vs. Holt, 128 U. S., 523, 524.

"Although the title of a periodical publication, as a newspaper, magazine or almanac, most closely resembles a trade mark on account of its repeated and continued use from time to time upon articles of a certain class, the protection afforded by the court is extended to the title of any literary production. Thus the publishers of 'The Birthday Scripture Book,' succeeded in obtaining an injunction against persons who had brought out 'The Children's Birthday Text Book,' Lord Romilly, M. R., remarking that the defendants were not entitled to publish a work 'with such a title or in such form as to binding or general appearance as to be a colorable imitation of that of the plaintiffs. And so where the title of a song was imitated in such a manner as to be calculated to induce the public to buy the spurious publication in mistake for the genuine, the continuance of the fraud was restrained."

Sebastian, 323–4.

"The good will of a business as embodied in a firm-name will be protected on principles analogous to those applied in cases of infringement of trade marks. It is true that a trade mark is held by some of the text-writers and, perhaps, in some adjudicated cases, to be a part of the good will and, necessarily, included in the sale thereof.

The object in purchasing the good will was to retain the old customers of A. Eichele & Co., and labels or wrappers bearing the name of the firm, or other brands or marks, by which goods, manufactured by that firm, might be identified, are *quasi* trade marks."

Peltz vs. Eichele, 62 Mo., 179.

"The correct decision of the case at bar depends on the

finding of two propositions: Was the imitation of the plaintiff's signs by defendant merely the result of an accident, or was it the result of a preconceived design to mislead the public into the belief that plaintiff's beer was being sold at the defendant's place of business? Was the imitation of the signs close enough to bring about such a deception? The evidence is clear that muslin signs of that character are unusual, and that the defendant never used them before. There was an obvious reason for plaintiff's adoption of them, because it had just started the sale of its beer at retail in a very large number of places, for which muslin signs could be provided at very short notice, whereas it might take considerable time to provide others. There was no obvious reason for the adoption of them by the defendant, since it merely continued at its place of business to sell its beer, known under the same name as heretofore, and such places were presumably amply provided with other signs. The similarity of the signs, the great prominence given to the word "American" in each, the close resemblance in size, color and lettering—all indicate design. The plaintiff thus gave evidence, from which the inference of a fraudulent design might fairly be made, yet the defendant adduces no evidence to rebut such inference. Under this state of the evidence we are warranted in finding—and do find—that the construction and hanging of defendant's muslin signs in close imitation of those of the plaintiff, was the result of a design on defendant's part to attempt a deception of the public to plaintiff's prejudice."

"On the second proposition we find by actual inspection of the two signs that the colorable imitation is close enough to work such a deception. The rule stated in Rawlins vs. Rawlins, 102 Mo., 563, and which the defendant now invokes in support of the judgment, namely, that the finding of the facts by the trial court, even in

equity cases, should not be disturbed, unless manifestly wrong, can have no application to a case where a question has to be determined by inspection, where the opportunities of inspection of the trial court and appellate court are the same. The finding of a fraudulent design must, in itself, to some extent, at least, influence the finding of the court as to the similarity of the imitation, becase whenever the similarity is such as may probably deceive, it comes with ill-grace from the defendant to say that he intended to deceive, but failed, because the resemblance was not close enough. If either party is entitled to the benefit of a presumption in the case above stated, it is the plaintiff, and not the defendant.' (Edelsten vs. Vick, 11 Hare., 78.)

The American Brewing Co. vs. The St. Louis Brewing Company, 47 Mo. App., 20, 21, 22.)

Re-read language quoted in Edinburgh newspaper correspondent. *Supra* p.

We have thus shown that a newspaper is indicated by a name; that the name is to all intents and purposes its good will; that the name of a newspaper is to it what a trade mark is to goods or merchandise; that the decisions with uniformity declare that the law regarding trade marks ought, by analogy, to govern the infringement of trade names—in fine, that the test of an infringement of a trade name is the same as that applied in cases of infringement of trade marks.

That as there is property in trade marks which a court of equity will protect, so there is property in the name of a newspaper which it will also guard, and as the essence of the value of a trade mark or trade name is that it distinguishes the article to which the name is applied from all others, and thereby identifies it in the mind of the public, so the use of any name which simulates the one sought to be protected, in such a manner that the general public

would be likely to mistake the one for the other; or to buy the one for the other; or to lead the public to believe that the one and the other were identical, is sufficient to warrant the intervention of a court of equity for the protection of the complainant.

If the foregoing cases prove these general propositions, they prove also the particular one that in the case of a newspaper, which is a property of the most delicate nature, the use of any name which would be likely to deceive third persons into the belief that it was the same newspaper as the one whose name it so imitates, is sufficient to call for the court's decree. It only remains to inquire, did the defendant so use the name Dispatch as to induce the public, and particularly the mortgagee, to believe that the two publications were the same. In the first place the word Dispatch was the distinctive characteristic of the name of the original newspaper and the original company, the one being the St. Louis Dispatch Company and the other St. Louis Dispatch. The defendant took the name Dispatch Publishing Company, and called the publication 'St. Louis Post-Dispatch,' continuing the publication at the same place, from the same office, and upon the same press.

We did realize that another name was added to that of the original publication; but we did not so realize it until after our rights had been jeopardized and we had been deceived into the belief by reason of the similarity of the name, as well as the other circumstances connected with its use, that the original and the new publication were the same, and that it was intended that we should take them to be the same. In other words, the change in the name was so slight that we never realized that a change was intended at all. And it was moreover so insignificant that it was not calculated to induce any one to believe that any change was designed or that the two publications

were issued as distinct publications. It is true we are not asking for any injunction, nor do we seek to restrain the defendant from using the name it is using or any part thereof, except as it may be incidental to the relief asked or to a foreclosure of the mortgage in question; but we are making the analogies justified by the foregoing decisions, and from infringement cases, so that the court may apply the estoppel claimed against the denial by the defendant of the identity of the old and new publications.

If we were justified in believing, from the name used, that the old and new publications were the same, or if the use of the name St. Louis Post-Dispatch was such as to induce the mortgagee to believe that the paper published by defendant was a continuation of the publication previously issued by the St. Louis Dispatch Company, then the estoppel against defendants denying the identity of the two is complete.

1. *Confusion of Mortgaged Chattels and therein of mortgaged 'Good wills,' in particular of Newspaper Publications*
2. *Estoppel to deny Identity of Publications.*

Treating, however, this change of name as complete and sufficient, and not such as to be likely to mislead third persons into confusing their identity, in answer to our second question, we state: That upon the principle of the wrongful or willful confusion of these goods or chattels, the newspaper of defendant should be sold to satisfy the mortgage lien, because it is impossible to sever the two publications in such manner as to reinstate and sell them as separate publications.

The leading case upon this subject is that of Hart vs. Ten Eyck, 2 Johns Ch. 108. "We cannot," says the chancellor in that case, "tell which were the six rights that he elected to appropriate to himself, nor can we tell

whether the fifteen rights which are specified as having belonged to Hart bore a ratable proportion in value to the whole mass from which they were taken. The rule of law and equity is strict and severe on such occasions. If a party having charge of the property of another so confounds it with his own that the line of distinction can not be traced, all the inconvenience of the confusion is thrown upon the party who produces it, and it is for him to distinguish his own property or lose it. If it be a case of damages, damages are given to the utmost value that the article will bear. (Armorie vs. Dalamorie, 1 Str. 595; Lupton vs. White, 15 Vesey, 432.)''

Hart vs. Ten Eyck, 2 Johns Ch. 108.

In the case of Burns vs. Campbell, 71 Ala., 288, the evidence tended to ''prove that the mortgaged goods were commingled with some of the property of the mortgagee's wife, and with after-acquired property of the mortgagor himself, which it is insisted the mortgagee had no lawful right to seize. According to the ordinary principle governing confusion of goods, if the goods of one person be wilfully, or, through want of proper care on his part, so mixed and confused with the goods of another that they cannot be distinguished, the latter is entitled to the whole, unless he consented to the act. (Walker's Am. Law 5th, ed. 343; Smith vs. Sanborn, 6 Gray, 134). And this doctrine applies to mortgaged goods, *such confusion making the whole prima facie, at least, subject to the lien and operation of the mortgage.* (Herman on Chattel Mortgages, p. 84, S. 40; Hamilton vs. Rogers, 8 Md. 301)''

In the case of Adams vs. Wildee, 107 Mass., 125, the following language occurs: ''The case, as we understand the report, justified a finding by the court, either that the property replevied embraced only that described in the

mortgages to the plaintiff's intestate, or that the disputed portion consisting of what was purchased by Gay to replenish his stock, was so purposely or carelessly mingled by him with the other mortgaged goods as not to be distinguishable. It was the duty of defendant, as he only succeeded to *Gay's title subject to the mortgages*, to identify the specific articles which were not embraced in them. This the case finds he failed to do. (Willard vs. Rice, 11 Met., 493)."

"It is furthermore objected" says the Court, in Dunning vs. Sterns, 9 Barb. 634, "that the intermixture of the *ashes* mortgaged with other *ashes* of Emory destroyed the lien. It does not appear that the defendant knew of or consented to the mixture; and in such case the ashes of Emory which he mixed with those mortgaged would, by the law on the subject of confusion of goods, become accessorial to the mortgaged property, and come under and be subject to the lien and operation of the mortgage. If the defendant had consconted to the mixture, the effect would have been to make him tenant in common with Emory of the ashes, after the mixture; and for the purpose of deciding this appeal, the effect would be the same."

The principle applies to every kind of property or right.

"The doctrine of the confusion of goods has been often discussed, and may be considered as clearly and distinctly settled. If the goods are of *the same nature and value*, although not capable of an actual separation by indentifying each particular, if the portion of each *owner is known, and a division can be made of equal proportionate value*, as in the case of a mixture of corn, coffee, tea, wine, or other articles of the same kind and quality, then each may claim his aliquot part; but if the mixture is undistinguishable because a new ingredient is formed, *not*

capable of just appreciation and division according to rights of each, or if articles of different values or quantities, and the original values or quantities cannot be determined, the party who occasions or though whose fault or neglect occurs the wrongful mixture, must bear the whole loss. (Lupton vs. White, 15 Vesey, 432; 2 Black. Comm. 405; Hart vs. Ten Eyck, 2 Johns. Ch. 62, 513; Sto, Eq. V. 1, Secs. 468, 623; Sto. Agency, Secs. 205, 333; 2 Kent's Comm. 364, 365; Sto. Bailm. Sec. 40; Bond vs. Ward, 7 Mass. 123; Shumeray vs. Ritter. 8 Pick. 443; Dane Abr. Chap. 76, Art. 3, Sec. 15; Armorie vs. Delamiria 1, Sto. 505; Panton vs. Panton, cited in 15 Vesey, 439. White vs. Lady Lincoln, 8 Ves. 563; Chadworth vs. Edwards, 8 Ves. 46; Newman vs. Payne, 2 Ves. Jr. 203; Ryder vs. Hathaway, 21 Pick, 298; Lewis vs. Whitemore, 5 N. H, 364; Seavey vs. Dearborn, 19 N. H. 351; Wolcott vs. Keith, 22 N. H. 196; Wilson vs. Lane, 33 N. H. 446; Gillman vs. Hill, 39 N. H. 311)."

Robinson vs. Holt, 39 N. H. 563-4.

The case of Kreutzer vs. Cooney, 45 Md. 589, while adopting the law upon this subject as set out in the foregoing decisions, also explains what is meant by "confusing the owners or mortgagor's goods by the consent of the owner or mortgagor." The facts are as follows: "The appellants bought replevin against the appellee for a certain quantity of type and other materials of a printing office. The plaintiff claimed under a bill of sale to them by one Stewart, of all and singular the types, forms, cases, composing stones, tables, books and all others, the materials, utensils, machinery and chattels personal, now in the third story of the building situate in the city of Baltimore, at the Northwest corner of Holliday street and Second street, and belonging to said Stewart. This bill of sale was duly executed, acknowledged and recorded etc. * * * * * * * * * * It appears from the testimony in the record,

and the granted instructions that the plaintiff permitted the materials covered by the bill of sale to remain in the possession of Stewart, to be used by him in printing a certain paper, and that after the execution of the same, Stewart purchased a quantity of type and other materials, similar to those above described, and mingled and used the same therewith, and afterwards sold the whole including what he had purchased as well as what was covered by the bill of sale, to the defendant, for a valuable consideration, who was in the possession of the same at the time the writ of replevin was served."

The Court in substance held:

First. That defendant acquired, by his purchase from Stewart, no title to those *goods* previously by bill of sale, duly recorded, sold to plaintiff, even though no possession was delivered under first sale—the record notice being sufficient.

Second. Having acquired nothing more than Stewart could lawfully sell, defendant must stand in the place of his vendor in respect to any claim or right which the plaintiff had to it, while in the hands of Stewart.

Third. Stewart could acquire no title to the goods in his possession which he had already sold, *by mingling with it property of the same kind which he afterwards acquired*, and the doctrine of confusion of goods would operate against him rather than in his favor.

Fourth. The foundation of that doctrine is the protection of the innocent; the loss and inconvenience must fall upon him causing the confusion.

Fifth. From the fact stated no presumption could arise that plaintiff assented to the intermixture. "They simply permitted their grantor to remain in possession and use of the property, relying, as they had a right to do, upon the recorded deed to protect their title. Whilst so in pos-

session Stewart held the goods as agent or bailee of the plaintiff, *and by his own act mingled them with others which he subsequently purchased. It would be very strange if by so doing he could acquire an absolute title to the goods thus left in his custody. Indeed the very reverse is what the authorities maintain.*" Here the court cites authorities included in our previous citations approving the principle that all the inconvenience of the confusion is thrown upon the party who produces it, and it is for him to distinguish his own property or lose it. But the case of Hamilton & Robinson vs. Rogers, 8 Md. 301, has been referred to and relied on as establishing a different rule. A brief examination, however, of what our predecessors then decided on this subject, will show that that case is not in conflict with the authorities we have cited. That was an action of trespass brought by a mortgagee against a judgment creditor of the mortgagor, and the officer who levied the execution, for seizing and carrying away goods alleged to be covered by the mortgage. The mortgage which *was of goods in a store contained a clause attempting to convey all* renewals and substitutions of these goods, the object being to include not only the articles then in store, but 'whatever may be at any time therein *in the course of the mortgagor's business.*' The court, after deciding the main question in the case, that the mortgage could not operate to convey the subsequently acquired goods, so as to give the mortgagee the right of action at law against the party seizing them, say, if the property of the plaintiff was commingled with that of the mortgagor, it must be taken to have been done with the plaintiff's permission, for he allowed the goods to remain in the possession of the mortgagor and under his control, *with the knowledge that it was his purpose to use them in the manufacture* of other articles, and then add: "The officer was bound to take the

property of the debtor, and if, by the *permissive act of the mortgagee*, the property of the latter was so intermixed with that of the mortgagor as to prevent separation or identification, the rights of *third persons ought not to be affected thereby, whatever might be the influence of such commingling as between the original owners.*" '

The same distinction also pervades the case of Chappell vs. Case, 18 Md. 513.

"There a party claiming a stock of goods in a store by bill of sale from one partner of the firm, applied to a court of equity for an injunction to restrain executions on judgment against the continuing partner, who was permitted to continue the business and buy other goods and bring them into the store. The executions were levied upon the goods in the store at the time of the levy, and the answers of the defendants averred that since the bill of sale the continuing partner purchased additional goods and brought them into the store, and has ever since carried on the business in his own name so that it would be impossible to distinguish the goods that were on the premises at the date of the bill of sale from those that have since been placed there, *and that this had been done with the full knowledge and consent of the complainant*. These allegations were established by proof, and it was in view of this fact *alone* that the court said that if by the permissive act of the complainant, his property became so intermingled with that of Kramer (the continuing partner,) as to prevent a separation or identification, and the complainant failed to point it out to the officer, the rights of *the judgment creditor ought not to be affected thereby*—thus simply following and reaffirming upon a similar state of facts the decision in Hamilton & Robinson vs. Rogers. There is therefore nothing in either of these cases in conflict with the general rule before stated, and that rule must be applied in this case."

Kreuger vs. Cooney, 45 Md. 593-4.

"It is the wilful and indiscriminate intermixture of the goods of another with one's own, so that they cannot be distinguished, which entitles the owner of the goods so intermixed to hold the whole."

Moury vs. White, 21 Wis. 421.

If a court of equity could decree the sale of the name of the newspaper (thus passing its good will) under this deed, and before the merger of the two names, it could do so only for the protection of an intangible right of property, contracted to be conveyed by the mortgage, and which in fact, is not subject to seizure and sale under exetion for the very reason that it is not tangible. Hence a newspaper property must always seek the Chancellor's aid for protection. If a third person uses its name the injunction of equity is interposed to compel him to desist or to prevent its further use; its sale outright is only affected by the transfer of a right to use a name in a publication, and the specific performance of a contract of the sale—or in fact the effectuation of the sale of the right, by whatever writing evidenced—can only be made by the aid of an injunction. If the mortgagee of tangible properties can have the aid of equity to protect him or his rights in mortgaged property wilfully confused by and with that of another so that the mortgaged property is indistinguishable therefrom, why should not the Chancellor extend his hand in a case of confused intangible property rights where the very principle of his intervention in the first case is most fully exemplified and most powerfully illustrated. When a mortgagor of chattels or the purchaser with notice the mortgagor of mortgaged chattels confuses the mortgaged property with his own, so that they are incapable of accurate distinction, the court charges the mortgage upon the whole mass for the very reason that the mortgagor or his purchaser with notice, has made it impossible for the mortgagee to foreclose his

mortgage upon the property specifically recited therein, asserting that to allow the mortgagor or the purchaser from the mortgagor to thus appropriate the mortgaged property, is to countenance and abet a most palpable fraud upon the mortgagee. It is to prevent fraud, to prevent a wrong doer from taking advantage of his own wrong, and to give to the innocent person the advantage and to the guilty one the inconvenience that the courts have thus acted. In saying this much I am only repeating in part the reasons given in all of the foregoing decisions. If the right to publish a newspaper of a certain name is the object of the conveyance and it is property mortgaged, and the purchaser thereof buys with notice, and deliberately publishes a newspaper having the name of a newspaper mortgaged and that of one unmortgaged in conjunction, why should not this purchaser be charged with the result of this confusion it has wrought? From what has been said we know that the circulation lists, &c., of the two newspapers became one—and the circulation became one. The reinstatement of the two journals into their original mortgage form became utterly impossible from the very nature of the business of publishing a newspaper. As we before explained the circulation and advertising attaching to a publication of a newspaper composed of the two formerly independent publications, could not be names accurately designated as the product of either, nor could it be determined how much of that circulation was derived for the use of one name or of the other. It is also clear that an injunction against the use of the name of the mortgaged newspaper after the issuance of the joint publication and the republication of *a paper* under the old name, would be like starting a new journal, as it is evident its patrons had already attached themselves to the joint publication. The special circumstances of this case, moreover, would furnish new difficulties in the

reinstatement of the journal into its original form and value or promise of value. Notably the action of the defendant in reference to the membership in the Western Associated Press, upon which, as we have previously fully explained, most reliance is and was placed for the continuance and maintenance of its circulation. This membership, being such an integral part of the newspaper itself, and such an element of value in connection with the publication; having such peculiarities of tenure and transfer, and being in a way inseparable from the publication, it is quite clear that no reinstatement of the journal under its own name, unless the membership itself would likewise be transferred, would be giving to the purchaser the rights formerly incident to the publication of the newspaper under the name mortgaged. We have already, we hope, made manifest the difficulties which *were made for us in connection with this membership* by the unfair and fraudulent conduct of the Dispatch Publishing Company, whereby it received a certificate and became a member, as 'purchaser or successor in the ownership of the St. Louis Dispatch (newspaper)', before the old certificate was offered for cancellation. Thus making it necessary, if the old publication had been reinstated, for the purchaser to enter into a legal contest with the Dispatch Publishing Company and the Western Associated Press, to regain the undisputed ownership of the membership, and to deprive the Dispatch Publishing Company of all right to use it, *the prevention* of its use by the Dispatch Publishing Company being an essential part (as heretofore explained) of the membership's value.

It is clear, therefore, that this membership enters intimately into the value of the mortgaged newspaper (name) and aside from the other reasons given, is conclusive to the point that the St. Louis Dispatch newspaper has been and still is incapable of separation from the present pub-

lication; that the value attached to it is inseparably connected with the St. Louis Post Dispatch, so that it could not be determined either to which name is due the publication's present circulation, or what is the proportional circulation derived from the use of the one name and the other. The good wills of the two papers are hopelessly commingled, and, agreeably to the rules and analogies we have endeavored to exhibit, the decree should go for the sale of the St. Louis Post Dispatch newspaper.

NEWSPAPER AND PLANT CONSIDERED AS AN ENTIRETY.

Corrollary (a) to Prop. III.— When the property forming the subject of a chattel mortgage is composed of many parts, as an engine, a mill, a manufacturing establishment, or a news-paper establishment, repairs and improvements thereto are to be deemed accessions to the plant taken as a whole, or to any of the parts of that whole.

At the time of the sale under the second mortgage under which the Dispatch Publishing Company acquired title, the newspaper, St. Louis Dispatch, was being published from No. 111 N. Fifth street, in the City of St. Louis, Mo., where it had its printing department, press rooms, etc., its editorial rooms and other news departments and its business office. We allege, "that the machinery, presses, type and all the paraphernalia for printing and publishing a newspaper as described in the said deed were acquired at the sale under the second mortgage and subject to said deed of trust, and was properly appurtenant to the publication of said newspaper, and at the date of its acquisition by the * * * Dispatch Publishing Company, the last named * * * entered into possession and use of the said machinery, presses, type, etc., and continued to use the same in the operation of the

business of publishing a newspaper for a long time thereafter, but * * * that from time to time it substituted new paraphernalia for publishing said newspaper and that in the conduct of said business in the stead of property so acquired and during the year 1879, from January to December thereof, and whilst the Dispatch Publishing Company was paying the interest on said debt and until the maturity of the note aforesaid, the defendant, the Dispatch Publishing Company, had thus placed in the building where said newspaper was publfshed, to-wit, at 111 N. Fifth Street, new presses, type and machinery, and that at that date it had none of the original presses, type and machinery for printing a newspaper described in said deed of mortgage."

"Your orator avers * * that the * * mortgage was * * * upon the good will and appurtenances of every kind and description of the St. Louis Dispatch Company, then and thereafter engaged in the publication of a newspaper; that said mortgage was made with the view and purpose of subjecting said good will of said company sustained by a newspaper publication to the lien of said mortgage and all the property appurtenant to said publication which was used in connection with the support of said good will. Your orator further avers that the good will of a publication is the essential element of value in it; that it constitutes the newspaper and did constitute this new paper as a property; that all the parts of a newspaper * * * constitute one homogeneous whole, and that the newspaper as a security depended for its value upon the integrity of all its parts; that said mortgage was a lien upon the good will represented by the publication, considered as *one homogeneous property*, as well as upon every distinct part thereof." (p. 13.)

The writer did conceive that the St. Louis Dispatch Company, when it executed its mortgage, contemplated

the transfer by that deed of a property, which in its hands constituted a homogenous organism. That is, that the conveyance was of a daily evening newspaper and its appurtenances, and it was the purpose of the grantors, by such conveyance, not only to transfer a daily evening newspaper and a newspaper plant, with all its properties and paraphernalia, in severance as two distinct securities, but also to give to the mortgagee a newspaper property complete and entire, i. e., the newspaper as the central property and the plant and all other properties as appurtenances. So that the newspaper and plant and other properties then formed an integral whole, no part of which could be alienated, lost or destroyed, without affecting the value and integrity of that whole. If repairs, improvements or changes in the machinery or properties used in connection with the operation of a mill or manufacturing establishment, or in the parts of an engine (without any reference to the doctrine of charging after acquired property with the lien of a mortgage by an agreement therein) can be charged with the mortgage here attaching to the mill, manufactory or engine, at the time such repairs, improvements or changes were made, *cæteris paribus* should not the lien of the mortgage in this instance be capable of attaching to repairs, improvements or changes made in this newspaper, and its appurtenances treated as a homogeneous whole—in the hands at least of the mortgagor? And if our mill, manufactory or engine might be thus charged in respect to such repairs, improvements or changes in the hands of the mortgagor, would they be the less chargeable if made by the purchaser from the mortgagor of such properties? Any repairs, improvements or changes to or in any portion of the property making up the newspaper property and its appurtenances, therefore, was under the proposition advanced by us, covered by the mortgage; that is, as between the mortgagor or his

grantee with notice and the mortgagee. This is a proposition for which we might contend and which is indeed asserted in the bill, but it is one which we may concede to be untenable, and still have enough property, as disclosed by the bill in defendant's hands) which either is or under previous propositions must in equity be held to be) the identical mortgaged property covered by the first deed of trust. For if our plant is gone in truth, we still have our newspaper and our membership. Unless, indeed, the occult art of prestidigitation practised upon us by defendant so successfully in reference to the plant shall also avail against the membership and the newspaper and leave us grasping empty shadows, with every part and parcel of our security gone. Like the 'baseless fabric of a vision, * * * an insubstantial fabric faded, leaving not a rack behind.'

But our third general proposition is not in altogether such a helpless plight, and we believe it is fully sustained by the following citations:

Generally repairs and improvements made upon a mortgaged chattel are in the nature of accessions thereto, and become subject to the mortgage. Boone on Mortgages, Sec. 244, citing Hamlin vs. Jerrard, 72 Me., 62; Southworth vs. Isham, 3 Sand., 448. Section 244, citing: Fowler vs. Hoffman, 31 Mich., 215. See as to whether a chattel obtained in exchange for a mortgaged chattel becomes subject to the mortgage lien. Marx vs. Davis, 56 Miss., 745; 55 Miss., 376; Berghoff vs. McDonald, 87 Ind., 550.

ALTERNATIVE PROPOSITION TO PROPOSITION III.

If the mortgage does not attach to the accessions made by way of repair or improvement to the whole of the plant or any of its parts, then a decree must at least go for the deficiency between the amount realized at a fore-

closure sale, and the value of the property lost, destroyed or used up.

In support of this we rely upon the following citation:

"Instead of charging the substituted property with the lien of the mortgage, the court has charged upon the appellants the value of the property, which was included in the mortgage, and which it is admitted they have consumed, sold, destroyed or disposed of. In this there is nothing inequitable. The value of this portion of the property is also agreed upon and *if what remains of the property should not produce sufficient to satisfy the debt due to the plaintiff, it is difficult to suggest a reason why they ought not to make it good. This is the only personal* liability cast upon them by the judgment. Even conceding that they took the property in hostility to the mortgage, not only not assuming to pay it, but denying that it was an existing lien, still they took with notice of the mortgage, and had no right to deprive the plaintiff of his security by destroying or disposing of the property."

Beers vs. Waterbury, 8 Bosworth (N. Y.), 396, 413.

N. B.—The principles asserted in citations appearing under former proposition as applicable to the confusion of the several good wills, we reassert here in reference to the whole property and especially in reference to the plant. (See p. of this Brief.)

ESTOPPEL.—PROPOSITION IV.

" *The Rule of Law is clear that where one by His words or conduct wilfully causes another to believe the existence of a certain state of things, and induces him to act in that belief, so as to alter his own previous position, the former is concluded from averring against the latter a different state of things as existing at the same time.* (Pickard vs. Sears, 6 Ad. & E., 469.)

What is known of the acquisition of this equity is explained in the bill, and has been gone over before and is about as follows:

That the sale was made subject to the mortgage of $15,000; that one Simon Arnold bid $2,500 for the equity; that Joseph Pulitzer acquired this equity subject to the mortgage and the Dispatch Publishing Company acquired it from Pulitzer, all by conveyances made in quick succession, within a few days from the date of the sale under the second mortgage. These conveyances were not recorded, and hence it is not known what were the terms of the several sales, nor what the Dispatch Publishing Company agreed to do with reference to the former mortgage, nor in respect to any after-acquired property which it, the Dispatch Publishing Company, might add to or substitute in the plant. Nor could it be ascertained whether or not it assumed the payment of the mortgage debt as part of the consideration of the sale to it of the property. The newspaper and the newspaper plant were undoubtedly charged with the mortgage debt, at the time the defendant acquired it, and, as previously fully explained, the defendant had actual and constructive notice of the same. Now, what was the actual situation of the defendant and mortgagee in reference to this property? All that the mortgagee positively knew was the equity in the property had

been acquired by Simon Arnold for $2,500, either for himself or Pulitzer; that Pulitzer came into possession of the same and himself transferred it to the Dispatch Publishing Company, of which latter company he, Pulitzer, was one of the promoters and in which he was the largest stockholder. (P.) That the mortgagee being a corporation domiciled in New York, sent forward the note to a St. Louis bank and received every sixty days thereafter, until the maturity of the note, the interest instalments thus payable according to the terms thereof. The addition of the word Post to the name St. Louis Dispatch, occurred almost, if not immediately after the defendant took possession of the premises and the property, the equity to which it acquired. The various sales of mortgaged chattels comprising the newspaper plant were made from time to time, and new property substituted for the same until at the time of the maturity of the note, none of the original mortgaged chattels in the plant remained. Says a writer upon Estoppel: "A was not bound to do anything at all, but he chose to do something; if he had done nothing, no legal consequences adverse to him would have resulted, but having done something, he gives (to apply an expression of a learned author) 'hostages to the law,' and become liable for the natural consequences of his acts." Cababe 83.

Now if, as a matter of law, in the absence of some agreement contained in the conveyance to it or otherwise (which agreement could enure under the law to complainant's benefit), the property acquired by the defendant in substitution of mortgaged property, after it acquired the equity—was not chargeable with the lien attaching to that for which it was substituted; and if, also (in the absence of an express assumption) the defendant, though selling out the mortgaged property in

piece-meal, could nevertheless not be personally charged with the payment of the mortgage debt; we ask the question what, under such treatment of the mortgaged property, would be the inferences which the mortgagee could naturally draw from the continuous and punctual payments of the sixty day's interest in installments, made after the addition of the word "Post" to the publication "St. Louis Dispatch," and before and after and during the progress of the substitution instead of and derived from the sale of old mortgaged chattels making up the plant.

The fair inference was that it was making these purchases from the proceeds of mortgaged property and the income derived from the publication — to preserve the integrity and usefulness of the plant, and that as the mortgagee had agreed in the deed that all after-acquired property should be subject to the mortgage lien, so the defendant had agreed with its grantee to hold such property after acquired subject to the mortgage. That inasmuch as it (the defendant) had purchased only an equity of redemption, and was thus treating the property while paying the interest, that it had also agreed with the grantee to pay the mortgage debt—in a word, its conduct in paying the interest under the special circumstances of this case, was a direct representation to the mortgagee that it had agreed with its grantee TO PUT ITSELF IN THE SHOES OF THE MORTGAGOR. If this is not a fair implication from its acts, what must we deduce? For it must be remembered that the defendant acquired a certain newspaper plant and a certain newspaper called the St. Louis Dispatch and a certain newspaper plant in connection therewith—subject to a mortgage. Immediately it added the word Post to the name St. Louis Dispatch, and immediately it began its substitutions of property in the plant from the proceeds of and instead of the mortgaged property. Now if defendant had wished to

convey the idea that it had agreed with its grantor to charge the property it should add to that mortgage or that which it should substitute for mortgaged property, it could not have expressed it more plainly in words that it did by paying interest.

If the newspaper as changed in its hands, was not by it agreed to be charged with the mortgage, why pay the interest? If the presses, type and other paraphernalia of the plant were being sold and defendant had not agreed to charge the property by it after acquired with the mortgage lien, why pay the interest?

If it had not agreed to pay the mortgage principal note —why pay the interest before, at the time, *after* it had disposed of the original mortgaged chattels in the plant, and after it made the previously mentioned change in the name of the newspaper? And why did it do all these things *in the manner in which they were done*, unless it had agreed with its grantor to *put itself in the shoes of the mortgagor* and to act concerning and deal with the mortgaged newspaper plant, in same manner and with the same liabilities as the mortgagor himself? The *intention* of the party from whose acts and silence a certain state of facts is inferred, or may reasonably be inferred, does not in the slightest degree affect the right of the party who acts upon the representation, from holding the person thus making the representation to it.

"Though the misrepresentation be innocent, yet if it were intended that some third person should act upon the footing of its truth it is conduct available as the foundation of an estoppel; and the misrepresentation cannot be more available (and of course it is not the less available) if, instead of being innocent, it be fraudulent."

Cababe on Estoppel, 63.

"By far the greater number of cases of estoppel by conduct," says the same author (p. 64-5), "are cases in

which A never intended his conduct to amount to a representation of the facts, to a representation of which it did amount, nor intended third parties to act upon the truth of such representation."

The defendant must affirm or deny the identity of the old and new publication, as it must affirm or deny that the new property in the plant was, under its agreement, to be subject to the mortgage lien. If it affirms it paid the interest during the time it held the newspaper plant as distinguished from the publication, and to protect it, this does not absolve it from the fraud it committed in reference to the plant, but rather emphasises it. And if it affirms it paid the interest AFTER IT HAD SUBSTITUTED NEW FOR MORTGAGED PROPERTY in the plant, because it conceived that the change of name was so slight as to be immaterial, so far as the mortgage was concerned — the effect of its conduct was none the less calculated to deceive the mortgagee concerning the question, whether or not it had agreed to hold ALL after acquired or substituted property as subject to the mortgage lien. Its payments, then as before, were of one piece—and all acts drawing after them in the mind of the mortgagee, the conclusion that defendant had agreed to hold the newspaper and the plant subject to the mortgage; and (or) had assumed to pay the mortgage debt. What explanation could it make to itself of defendant's conduct? If the latter had none of the mortgaged chattels comprising the plant, and if it did not have the newspaper which was mortgaged—upon what theory could it pay the interest, unless it had agreed to charge after acquired parts of the plant with the mortgage (that is to preserve its integrity) or to pay the debt. The question is the natural effect of defendant's conduct upon the mind of the mortgagee. What was it naturally to infer or what did it have a right to believe? The mistakes of such a wrong-doer should not be enter-

tained for its protection. The mortgagee could not believe that defendant was paying this interest to "lull to security," with the purpose of taking from it absolutely, without restitution, property conveyed to the mortgagee. And if the conduct of defendant was such as to "lull to security rather than to warn of danger," it could not, no matter how innocent might have been its motives, deny the truth of a state of facts fairly deducible from its acts. Had there been anything OF RECORD, or HAD THE DEFENDANT IN ANY WAY EXPLAINED ITSELF, the case might stand differently. But it failed to explain, and kept absolute silence. The only possible conclusion to be drawn from its acts, and that silence, is that it had agreed to put itself exactly in the shoes of the mortgagor—the St. Louis Dispatch Company — both as to after-acquired property and all other, as well as to the payment of the debt. If it meant neither to induce the complainant to believe that it had agreed to charge the new (substituted) property, nor to pay the mortgage note—the only other conclusion is that it then designed to defraud the mortgagee. To say that we might have brought a suit for damages as for a conversion against the defendant, does not change the effect of defendant's misconduct; and no one can deny that we are deprived of remedies and rights we could have asserted and exercised if we had not relied upon defendant's good faith. If its fraud and deceit led us to believe we had something as a security, which we had not; or if it led us to the conclusion that the defendant had agreed to pay the mortgage debt—and such conclusions were fairly inferable—then defendant's fraud and deceit have robbed us of our security, and made the recovery of our debt impossible. The mortgagor, St. Louis Dispatch Company, had ceased active business and had sold or lost all of its property; and defendant knew that the mortgagee's

sole dependence for its security and for its debt was upon it (the defendant) and the property it acquired. Assuming, and having, under the peculiar circumstances, a right to assume, the defendant was not acting in the manner in which it did act, with the purpose of defrauding it of its security or defeating the payment of the note, it was entirely natural that the mortgagee would not take any steps for the preservation of its mortgaged plant, because it was truly being 'lulled to security' and in no wise "warned of danger." When the note matured; after the changes in the plant were completed—the mortgagee was told that defendant had none of the chattels mortgaged and forming part of the plant. That it did not even have the newspaper which had been by it purchased subject to the mortgage. By this course of conduct our position was greatly altered for the worse. It is manifest that if the defendant, instead of refusing to pay the principal, had refused to pay the first interest installment, we could have entered into our plant, and have published our newspaper and sold our other properties connected therewith—under our mortgage. And if any question had arisen concerning our right to the use of the name "Post" in conjunction and hyphenated with "St. Louis Dispatch," the shortness of the time during which the two names had been used in the publication would have made the question of little or no importance, if indeed such a change is of any importance now. When our right to sue for a conversion is mentioned, it is well to bear in mind that, before we were lured from our natural course by defendant's shares, we not only had a right upon default to foreclose our mortgage and to enter into possession of the mortgaged plant and newspaper, but we had our original mortgaged estate at hand, *into which we could have entered and upon which our mortgage could act.* But the mortgage is not confined to one remedy, having

many which he may pursue concurrently (supra) still if from defendant's conduct, we could fairly infer that it had agreed "to place itself in the shoes of the mortgagor," we would certainly be entitled to the fruits of that representation, by enforcing it against defendant, and not be compelled to sue for damages for conversion, and lose the right to the specific property which it had represented was encumbered within the mortgage lien; or the right to a personal judgment against it for the mortgage debt which it had equally represented it would pay at maturity. If the representation was to the effect we have stated, our choice of remedies remained; and defendant would have no greater right to make statements and then deny them, whereby our position would be altered for the worse, than it would have if upon such statements we acted, and by their subsequent denial we would lose every right or remedy we previously had. In other words, it cannot be permitted thus to alter our position; nor would it be permitted to deny the truth of "representations" upon which we acted, and whereby we were induced to remain inactive, and "to refrain from taking steps which otherwise we might have taken, or likely would have taken.

"It is enough * * * to show that the party claiming the estoppel was induced by the other party to *refrain* from obtaining a *particular* benefit which he would otherwise have been reasonably sure of acquiring, (Bigelow Estoppel, p. 645, and cases); or that the person pleading the estoppel had 'forborne to take steps (which he might otherwise have taken) to protect himself.'(Bigelow Estoppel, p. 646, and cases)."

Complainant had the right to know the terms upon which the defendant acquired the property; but if they did stand at arms' length, such a relative situation would not warrant the open commission of fraud upon the mort-

gagee by defendant, nor would such dealing at arms' length lead a Court of Equity to permit it to take advantage of such fraudulent acts.

The estoppel applies: "If by his acts, or words, or neglect, his non-averring the truth or asserting a just demand, *would work some wrong to some* other person who has been induced to do something, or *abstain from doing* something, by reason of what he has said or done, or omitted to say or do."

Ex parte Adamson, *in re* Collie L. R. & Ch. D., 307, Cr. Ar.

"Where a person perceives that, in a matter of interest to himself, another person is acting, or about to act, or likely to act, in a mode in which, as a reasonable man, he would not act, or be likely to act, if he knew the real facts, a duty arises on the part of the former to inform the latter of such real facts, if he is aware of them, and if the relative positions in which the two parties stand towards one another are such that the latter might reasonably expect the former to tell him the real facts if the former were aware of them." (Cababe, 85).

"If a man either in express terms or by conduct makes a representation to another of the existence of a certain state of facts, which he intends to be acted upon in a certain way, and it be acted upon in that way, in the belief in the existence of such a state of facts, to the damage of him who so believes and acts, the first is estopped from denying the existence of such a state of facts."

Carr vs. London & N. W. R. Co., L. R. 10 C. P. 307.

In a word, that defendant by its conduct did "make a representation" to complainant, "of the existence of an agreement," whereby it had bound itself to put itself under all the obligations of the mortgagor, upon which

representation it intended the mortgagee to act, and upon which the mortgagee did act, in the belief in the existence of such agreement to its damage.

We conceive that this principle exactly fits this case.

All the elements which, according to Bigelow (a), must actually or presumably be present in order to an estoppel by conduct exist here.

First. The defendant made the representation we have deduced that it had agreed to charge substitutions and after acquired property with the mortgage and to pay the debt, the truth of which representation it now denies.

Second. The complainant did not know upon what terms and conditions defendant held the property; (a) because the instrument under which the latter acquired the equity was not recorded; (b) because defendant actually concealed the terms of its tenure of the equity from complainant.

Third. Complainant did not during the times in question, know of the terms of such tenure, nor has it since learned them.

Fourth. Its payment of the interest *under the circumstances previously detailed* is conclusive of defendant's intention that complainant should act upon the truth of the representations imported by its conduct.

Fifth. It is very obvious that complainant acted upon the assumption of the truth of the representations so inferred.

"The term 'representation' is used for convenience. It is not necessary that there should have been express statements. The representations may be implied from acts, silence or concealment. * * * The rule is well settled that if the representation containing all the foregoing elements has also been acted upon, the estoppel arises."

Bigelow on Estoppel, 492.

Herman on Estoppel, 129, thus states the doctrine: "Before the party is concluded by an estoppel, it must appear, first, that he has made an admission which is clearly inconsistent with the evidence he proposes to give, or the title or claim he proposes to set up; second, that the other party has acted on the admission; 3d, that the other party will be injured by allowing the truth of the admission to be disproved. When the acts and representations of the party must have influenced the other to do acts which he would not otherwise have done, and when a denial or repudiation must operate to the injury of such other party, the estoppel is created."

"It would be a fraud," says the court in Bales v. Perry, 51 Mo. 449, "to assert what his previous conduct had denied, when, on the faith of that denial, others had acted."

We also believe we are within the analysis of estoppel given in Darrell vs. Odell, 3 Hill, 219, quoted in Taylor *et al.* vs. Zepp, 14 Mo , 488: "There must be first an admission inconsistent with the evidence proposed to be set up; second, an action by the other party upon such admission; third, an injury to him by allowing such admission to be disproved."

The 'analyses' of Herman and Bigelow and in Darrell vs. O'Dell, are all approved and *quoted* in Acton vs. Dooley, 74 Mo., 69, and in Blodgett vs. Perry, 97 Mo., 273.

Applying these principles to the facts stated by us, is not defendant concluded from denying either the liability of its 'newspaper' and newspaper plant to be charged with the lien of the mortgage or its own personal liability to pay the mortgage debt?

PROPOSITION V.—STATUTE OF LIMITATIONS.

If the grantee of the mortgagor of mortgaged chattels with notice is in the shoes of the grantor, having no rights higher that those of the mortgagor, taking with notice and subject to the liens and equities attaching to the mortgaged chattels in the hands of his grantor (the mortgagor) then he can assert no other defenses, nor can he rely upon any other limitations *against the mortgagor* than such as the mortgagor, against the mortgagee, could himself have asserted.

If this be true (which we will endeavor to show) it follows, that if any statute of limitations can be successfully pleaded in bar of the maintenance of a foreclosure of a mortgage during the life of the debt (excepting, of course, the statute relating to *an adverse possession*, realty), that it must be the ten years' limitation under personal actions having regard to actions arising "upon a writing, whether sealed or unsealed, for the payment of money or property."

The Lien of the Mortgage.

"A mortgage," says Wood on Limitations, 449, "being a specialty, is barred by the lapse of the period, after it becomes due, fixed upon by statute for that class of obligations; and where specialties are not specially provided for, they are left subject to the common law presumption of payment from lapse of twenty years, without the payment of any part of the principal or interest after it becomes due."

Says Pollock, Pr. of Contracts, in a note on page 630: "Under the unwritten laws a debt either of a specialty or a judgment will be presumed to be paid after a lapse of twenty years, unexplained, when there has been no recognition of it by the debtor, and in many cases the jury

may infer payment after a less period, varying according to circumstances."

Citing Cases.

"The same rule," says Wood, 451, 452, "prevails as to mortgage debts as prevails in reference to other debts, that the statute simply defeats the remedy but does not extinguish the debt; but as these are distinct remedies upon the debt and the mortgage given to secure it, and the nature of the remedies depends upon the character of the respective instruments, it would seem to follow that, in the absence of an express statute to the contrary in those states where a distinction is made between simple contracts and instruments under seal, the circumstance that the statute has run upon the one would not prevent or bar the remedy upon the other upon which the statute has not run; and as we have before seen, except where the statute expressly or by fair inference destroys the remedy upon the mortgage, at the same time the remedy is destroyed as to the debt, it may be enforced after the statute has run upon the debt, unless the same statutory regulation is applicable to both."

"The facts, as stated in the record, do not warrant the conclusion to which the court came in relation to the right of the plaintiff to foreclose. Although a debt is barred by the statute of limitations so that action cannot be maintained to recover it, yet, if that debt is secured by a mortgage, its payment may be enforced, so long as the mortgage is available."

Angel on Lim., 77, 78.

Judge Scott, in Chouteau's Exer. vs. Burlando, 20.,487, "It seems to be well settled, though not without some diversity of opinion, that *an action* may still be maintained on a mortgage, notwithstanding the lapse of a period of time sufficient to bar the debt, if it stood alone.

(Thayer vs. Mann, 19 Pick, 535; Bank, etc., vs. Guttschlick, 14 Peters R., 10; 2 Hill Mort., Ch., 25, and cases there cited.)"

Wood vs. Augustine, 61 Mo., 51.

"There is no sort of propriety in confounding the statute of limitations with the presumption of payment arising from lapse of time. As defenses, the two are wholly distinct in their applications and incidents. When the *statute affects a right of action*, it operates simply as a blight, as it were, upon its recoverable energy. It matters not in the least whether the demand has been previously paid or not; the statute destroys forever, upon the last day of the allotted period, its vitality in a court of justice. Hence if there be not a new contract in the promise or acknowledgment upon which the creditor relies, he has still nothing to stand upon. But in the other defense the *fact* of payment, real or supposed, is the only matter to be considered. The law first presumes payment. An acknowledgment by the debtor merely removes the presumption by furnishing evidence to prove that the debt has not been paid. There is no new contract express or implied. The recovery must be upon the original demand are nothing. Our statutes of limitation are directed against a variety of civil remedies by name, class or tubject matter, but foreclosure of mortgage is not one of them. *Every limitation affecting the recovery of real estate requires an adverse possession to support it.* But between mortgagor and mortgagee there is no adverse possession so long as their original relations continue to subsist. The possession of the one is amicably consistent with all the rights claimed by the other."

Cape Girardeau Co. vs. Harbison's Adm., 58 Mo. 95, 96.

"Twenty years being the period of limitation in nearly

every jurisdiction outside of Missouri, that has been also the commonly accepted term which may create the equitable presumption of payment."

Cape Girardeau Co. vs. Harbison's Adm., 58 Mo. P. 95.

"It has been held in this state that though the note or bond, secured by a mortgage or deed of trust, may be barred so that no action can be maintained thereon, yet the mortgage may be enforced by foreclosure or a sale under the deed of trust. Chouteau vs. Burlando, 20 Mo., 483; Cape Girardeau Co. vs. Harbison's Adm., 58 Mo., 90; Wood vs Augartine, 61 Mo., 46; Lewis vs. Schwem, *ante*, p. 26. In the case last cited, it is held that to bar a foreclosure under a deed of trust or mortgage, it must appear that there has been ten years possession of the property (realty) adverse to the mortgagor. In this case, there has been no such possession, and the deed of trust was available to the estate, for what the land was worth, *though this debt was barred by the statute of limitations*."

Booker vs. Armstrong, 93 Mo., 58.

"It is now too well settled in this state to admit of further discussion that a foreclosure sale, under an unsatisfied mortgage or deed of trust, will not be barred by the statutes of limitations unless there has been an adverse possession of the mortgaged property, for the requisite period to create the bar. Lewis vs. Schwem, 92 Mo., 29; Booker vs. Armstrong, 93 Mo., 55; Gardner vs. Terry, 97 Mo., 524."

The City of St. Louis vs. Priest, 103 Mo., 655.

"Although a note secured by a deed of trust may be barred by the statute of limitations so that no personal judgment can be had on it, it does not follow that the remedy on the deed of trust is barred. To defeat a fore-

closure or other remedy there must have been ten years adverse possession. These principles of law have often been asserted by this court."

Gardner vs. Terry, 99 Mo., 525.

The lien of a mortgage or deed of trust is not available, however, against a ten years adverse possession of realty for the reasons given in same case. Says the court at page 526: "In general the statute of limitation is a defense only, but *ten years adverse* possession of real estate will not only bar an action of ejectment, *but it* will confer title upon the possessor. A title thus acquired is as good as any other title, and ejectment may be maintained, as well as defended, upon such a title.

Nelson vs. Brodhock, 44 Mo. 596; Fulkerson vs. Mitchell, 82 Mo. 13.

"It is therefore difficult to see why a title thus acquired is not entitled to the same protection as a title acquired in any other way."

Gardner vs. Terry, 95 Mo. 526.

But says the court in the City of St. Louis vs. Priest, 103 Mo. 655. "The possession of real estate which will create a bar, under the statutes of limitations, must be actual, open and visible—such as will give notice to all the world that a claim of ownership is asserted."

Scruggs vs. Scruggs, 43 Mo. 132.
Bowman vs. Lee, 48 Mo. 335.
Gray vs. Givens, 26 Mo. 291.
See the Benton Co. vs. Czarlinski, 101 Mo. 209.

That the ten years adverse possession under limitations to real actions in Missouri, confers title on the adverse occupant, is asserted in the following cases:

87 Mo. 493.
59 Mo. 444.
51 Mo. 177.

47 Mo. 282.
44 Mo. 596.
38 Mo. 561.
37 Mo. 408.

And it is not even necessary to *plead* the statute of limitation, but adverse possession may be shown under the general issue.

94 Mo. 280.
93 Mo. 452.
91 Mo. 628.
82 Mo. 13.
76 Mo. 454.

This is the difference in Missouri between statutes of limitations in real actions and those governing personal actions, that the first extinguishes the right or title in the property itself, and the second *has regard only to the remedy sought for the enforcement of any specific right*. If the remedy invoked, under the limitations to personal actions, comes within the ten, five and three year's bar, and the defendant in the action pleads the proper statute, the plaintiff's recovery in that action is defeated. The general rule is well stated in Pollock on Principles of Contract, at page 630.

"The statute of limitations admits the cause or consideration of the action still existing, and merely discharges the defendant from the remedy."

At page 633 the same author says: "The act for the limitation of actions and suits relating to real property (3 and 4 Wm. 4, c. 27) does not only bar the remedy, but extinguishes the right at the end of the period of limitation. (S. 34. See Dart. V. and S., 402). It is therefore unconnected with our present subject."

"We have seen that by the operation of the statutes of limitation applicable to contracts, the right itself is not

destroyed, but only the conditions of enforcing it are effected. The law of limitation is a law relating not to the substance of the cause of action, but to procedure."

These citations describe the nature and mark the distinction between our statute of limitation relating to real and personal actions.

If the action of foreclosure is within the contemplation of any statute of limitation, it would not be barred for ten years, as it arises from a 'writing' under seal 'for the payment of money or property.'

If, after all that has been said, it could be maintained that ten years is a bar to the foreclosure of a mortgage lien, it is obvious that our lien still subsisted at the time of the commencement of this action. And assuming that the purchaser from the mortgagor of the mortgaged chattels could, whilst claiming title from the mortgagor, plead (what the mortgagor himself could not) the five years statute of limitations against an action for conversion, or for recovery of specific mortgaged chattels in its possession, *it is certain* that, *in respect to chattels* IN ITS HANDS *acquired* from the mortgagor, subject to our mortgage, the lien of the mortgagee cannot be defeated, because in no event does an adverse possession of chattels for a period of five years do more than bar an action for their conversion, or an action at law for their recovery. As has been clearly shown, none of the statutes of limitations under personal actions act upon the rights of action, or the title or right of property, but have reference only to the remedies. An adverse possession of personalty for five or ten years, therefore, does not affect its title, and it has regard only to the remedy sought to be enforced for its recovery. There is, therefore, no analogy between the statutes of limitations referring to real actions and those concerning personal actions. This being conceded, then, even under the assumption that the Dispatch

Publishing Company acquired title in hostility to the mortgagor, and has held in hostility to the mortgagor and mortgagee alike, the only effect of the five years' limitation would be to bar an action for the conversion of those chattels which it has sold, lost or destroyed, and for the specific recovery of such chattels as it may still have. But it cannot by such a plea, under any analogy, destroy the effect of the decisions quoted, or the ten years statute for that matter, and prevent a foreclosure of the mortgage lien upon such rights and properties of the mortgagee *it still has in its possession, in whatever shape or form it may still hold them.*

The "mortgagee of chattels may pursue all his remedies concurrently. He may maintain a suit at law to recover the mortgage debt, and also suit at law to recover possession of mortgaged property, and at the same time proceedings under a statute or in equity to foreclose the mortgage. * * * The foreclosure is inherently a matter of equity jurisdiction."

Jones Chatt. Mtgs, 758.
Thornton vs. Pigg, 24 Mo., 257.

" It is not only ' well-settled that equity will take cognizance of a bill to foreclose a mortgage (Am. Ency. of Law, pp. 295–6, and Notes: Tit.., Mortgages); but under some circumstances this remedy is not only preferable, but the only practicable one; as for example, in mortgages of things in action, of railroad rolling stock, &c.

Pomeroy Eq. Jur.. Sec. 1230, p. 1889, No. 1 and cases cited.

It is needless to add that the properties forming the subject of this mortgage are peculiarly within equitable cognizance.

PROPOSITION VI.

It is asserted that our delay in instituting the foreclosure proceeding is such laches as would justify a court of equity in refusing to grant us any relief, if in other aspects of the case we might be entitled to any. This charge of laches grows out of a delay of a little over *seven* years, and not nine years, as is alleged in the demurrer and in the opinion of the court below in the institution of the suit. As will appear, under the Missouri cases cited, no period short of that fixed by the statute of limitations, will entitle the party to make or the court to entertain this plea. We add the citations upon which we rely for this assertion.

"We put aside at once the point as to the staleness of the plaintiff's claim. The sale took place in May, 1864, and this suit was instituted in January, 1874, less than ten years thereafter. The statute of limitations in this State applies to all civil actions—to those which were denominated suits in equity as well as to actions at law. Mere lapse of time, short of the period fixed by the statute of limitations, will not bar a claim to equitable relief, when the right is clear and there are no countervailing circumstances."

Kelly vs. Hurt, 61 Mo., 466.

"In cases where a party comes before the court with a clear right entitling him to the relief, there being no remedy at law, something more than mere delay must be shown before the relief asked can be refused, such as that the party has slept upon his rights till the property sought to be regained has been enhanced in value by improvements made, or *that some other matter has intervened which would give to the party who has thus lain idle an unconscientious advantage over the party if the relief asked were granted him.*"

Spurlock vs. Sproule, 72 Mo., 511.

"In such a case where a suit is brought to redeem something more than mere laches must be made to appear before a court of equity will deny to him its aid in the enforcement of a clear right."

Ibid.

"It is not pretended that there is any want of equity in the petition. Our present statute of limitation is applicable to all civil actions, whatever they are, such as were heretofore denominated actions at law or suits in equity; and when the statute allows ten years in which to bring a suit, and the plaintiff begins it within that time, I do not believe that he is required *to state in his petition any excuse for not bringing it sooner.*"

Bliss vs. Prichard, 67 Mo., 192.

"No laches by way of lapse of time, short of the statutory period of ten years, will avail the debtor in the absence of countervailing circumstances evoking some principle of equitable estoppel."

Vanderline vs. Smith, 18 M. A., 61.

To the same effect—Dobyns vs. Rice, 22 M. A., 457.

"We adhere, says the court, in the case of Kelly vs. Hert, *74 Mo., 562*, to what was said by this court on the subject of the statute of limitations and the staleness of plaintiff's claim when this case was first here, (61 Mo., 463, 466) and to what has subsequently said by this court on the same subject in Bliss vs. Prichard, 67 Mo., 171; Bradshaw vs. Yates, 67 Mo., 221, 232; and Spurlock vs. Sproule, 72 Mo., 503."

The principle of these decisions has never be contested since and they embody the settled doctrine of the Missouri Supreme Court.

Such being the doctrine of the Missouri Supreme Court upon the subject of laches, it is obvious that however long our delay in the institution of our suit to foreclose or

for equitable relief, under the mortgage, so long as the period of limitations had not elapsed, lapse of time would not be a bar to the remedy or the relief asked.

But applying the doctrine of laches as announced by the most latitudinarian constructionist, we cannot see that *any rule ever laid down* would include this suit either within its spirit or letter. Assuming that in those cases where courts have held 'laches' as a bar to an action or suit, *not* by analogy to the statute of limitations, but upon the distinctly equitable ground that the suitor had 'slept on his rights' until the enforcement of them would operate *unjustly* against the defendant, by reason of the changed status of the property (the change having been affected by the defendant and having greatly enhanced its value), or by reason of any change whatsoever, it is humbly submitted that no change took place in the property in question between the date of the maturity of the note and the date of the institution of the suit, excepting that within a few weeks a new certificate of membership was procured from the Western Associated Press, as we have elsewhere fully explained. All the changes in the plant were made before the maturity of the note and within a few months after the acquisition of the whole property by defendant. The newspaper itself was called St. Louis Post Despatch instead of St. Louis Dispatch, contemporaneously with the sale under the second mortgage, the purchase by Arnold and Pulitzer, and the organization of defendant. We fail to see therefore what disadvantage accrued to defendant or what rights it subsequently acquired liable to be affected by a decree herein, by reason of our delay in the institution of this suit. Moreover, we are not seeking to *recover* any property; we are only endeavoring to procure a decree for its sale to satisfy a debt charged upon it, when defendant with notice acquired it. So the increased value of its property

or any of it by reason of lapse of time, changes and improvements, is really of no consequence to the defendant, if the property it then had was worth more than the amount of the lien we *now* seek to enforce against it, as the petition alleges. We do not expect to *get* the benefit of its *increased* value, even though, as a matter of fact, aside from assumptions in the defendant's behalf, made here for the purposes of the argument, the property as it now stands as a whole, would be deemed to be chargeable with the mortgage lien. We can not get more than our debt, interest and costs, and this would be far less than the value of the property at almost any period of the time during which defendant has held it.

The other hypothesis which defendant must advance in support of its plea of laches, is that plaintiff's right of action accrued at the moment of the former's entry into possession of the mortgaged estate after the sale and purchase under the second mortgage. Because it was then the name of the publication was changed as indicated and the repairs and changes in the plant began to be made. It will not be forgotten, however, that it was also at this time, and during the interval succeeding the purchase and until the maturity of the mortgage, each two months' interest instalment was paid as they respectively matured. The line of defendant's argument leads to the conclusion that when the word "Post" was hyphenated with "St. Louis Dispatch," we should have immediately filed our bill for an injunction or forever lose our right to seek equitable aid in the enforcement of the mortgage lien sought to be fixed upon the newspaper by the mortgagor; or that, at least, our delay in invoking the court's aid for the protection of that interest has been unreasonable. When it is remembered that only by the aid of equity could the mortgagee's right to the newspaper (name) as a property be enforced, from the very nature of the property, the contention that

we have lost by delay, the opportunity of asserting this right is certainly extraordinary. So far, therefore, as the newspaper is concerned, the lien itself was enforceable only in equity, and it is hard to understand how our delay would affect injuriously the defendant who acquired the property with notice of the mortgage, the validity, or at least, existence, of which it recognized by paying the interest, and the status of which *newspaper* as such has in nowise changed since the very date of defendant's acquisition of it. See case Menendez vs. Holt (*supra*). It is not disputed that our lien originally extended to the plant defendant acquired when it got the newspaper; the point made now, among others, is that our delay has been fatal in not taking some action, *showing* our determination to assert a claim to that plant. In this, that when the changes, etc., were made in the plant, immediately after the purchase of the newspaper, complainant did not forthwith, or any time within five years, sue defendant for conversion of so much of the mortgaged plant as these several changes represented.

If our answer is that we did not know what changes you were making in this plant, it asserts we ought to have known of them, and this, in face of the fact that defendant paid the interest, while it was in the act of making the changes, and complainant was over 1000 miles away. This part of the argument is answered by the section of this brief entitled "Estoppel" wherein we sought to show that, by its conduct and silence, defendant could not be permitted to assert that the plant, as it existed at the date of the maturity of the note, was not the identical property sought by its grantor to be charged with this mortgage lien. If we have a right of foreclosure upon the plant at all, at the time of maturity of the note (the changes having been made previous to that time) nothing was lost to defendant by our delay thereafter. If, in contemplation

of equity or by virtue of the estoppel pleaded, our lien did not attach to the plant as it existed at the maturity of the loan; or if, in a foreclosure proceeding upon the whole property, defendant would not be liable for the difference to the extent of the value of the lost or destroyed property, between the amount realized at a sale and the indebtedness due; or if the principle of confusion of mortgaged goods would not so effect the plant—why, then, the machinations of defendant, whereby plaintiff was duped, misled and outrageously deceived, have been, so far as the plant is concerned, eminently successful, and it has deliberately stolen property by a trick and device, the use of which would put to shame a confidence man and make a highway robber blush.

Our dilatoriness must likewise defeat our claim to the membership, the title to which defendant sought to becloud and confuse by differentiating tweedledum and tweedledee. What accommodating by-laws to give the defendant the title to a membership by virtue of defendant's purchase of the St. Louis Dispatch Co'. newspaper and then to enable defendant, when it added "Post" to the word "Dispatch" to say that, as the St. Louis Dispatch had gone out of existence, that paper could not be sold by complainant and the title to the membership had, by defendant's act in destroying the newspaper, been at once completely lost to complainant and forever assured to defendant. After all this jugglery and sleight-of-hand performance —this now you see it and now you don't policy—can we be astonished that the virtuous defendant would plead laches, if, when our amazement at his convolutions had subsided, we bethought ourselves of the aid of the chancellor to protect us in our rights? What a parody upon equity procedure! Listen to the plea of laches from such lips as those! Hear the cry of too late! too late! uttered by one who is crouching under the heavy hand of the law, and,

with furtive glance at its stern officer, squirms and writhes in the vain endeavor to loosen the iron grasp! Must the defendant respond? Or, shall the thief, with a leer and a wink, with the spoils in his pocket, in brazen impudence, walk away, leaving us amazed at the possibilities of human depravity, when guided and protected by law, interpreted in the "letter which killeth?"

The only one to suffer from the grant of relief is the individual or corporation whose iniquities have brought about the injuries against the correction of which this plea is interposed.

Lord Brougham, whose words cannot be too often repeated and pondered, remarked in case of Docker vs. Somes, 2 Myl. & K., 674:—

"When did a court of justice, whether administered according to the rules of equity or law, ever listen to a wrongdoer's argument to stay the arm of justice, grounded on the steps he himself had successfully taken to prevent his iniquity from being successfully traced? Rather let me ask, when did any wrongdoer yet possess the hardihood to plead, in aid of his escape from justice, the extreme difficulty he had contrived to throw in the way of pursuit and detection, saying, 'You had better not make the attempt, for you will find I have made the search very troublesome.' The answer is, the Court will try."

Respectfully submitted,

JOHN M. DICKSON.

Solicitor for Appellant.

149 U.S. 430
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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1892—TERM NO. 224.

THE METROPOLITAN NATIONAL BANK OF NEW YORK,

Appellant,

vs.

THE ST. LOUIS DISPATCH CO., THE DISPATCH PUBLISHING CO., THE PULITZER PUBLISHING COMPANY AND HENRY L. SUTTON, Trustee,

Respondents.

STATEMENT, BRIEF AND ARGUMENT FOR THE RESPONDENTS.

C. GIBSON, AND
C. E. GIBSON,
Solicitors for Respondents.

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Respondents.

STATEMENT, BRIEF AND ARGUMENT FOR THE RESPONDENTS.

STATEMENT.

The facts set out in the bill of complaint may be summarized as follows: This suit is brought by the Metropolitan National Bank of the State of New York against the St. Louis Dispatch Company, a corporation organized under the laws of the State of Missouri; the Dispatch Publishing Company, a corporation likewise organized under

the laws of Missouri, and H. L. Sutton, trustee, and a citizen of Missouri. The Pulitzer Publishing Company, a corporation likewise organized under the laws of Missouri, also appears herein as a defendant, under a stipulation signed by the parties which will be more particularly referred to below.

The averments of the bill show that on June 1, 1877, the St. Louis Dispatch Company was engaged in publishing a daily newspaper called the "St. Louis Dispatch," and on that day being in need of money, it conveyed its "machinery, type, presses, cases, furniture, paper, forms and tools, together with the good will of the St. Louis Dispatch Company, and its franchises of every kind and description, including a certificate in the Western Associated Press (a corporation organized under the laws of the State of Michigan) to Henry L. Sutton, as trustee, to secure the payment of its note for $15,000, that day executed in favor of Frank J. Bowman, and made payable two years and six months after date with interest at the rate of nine per cent. per annum, one and one-half per cent. of said interest being payable on the first day of October, December, February, April and June in each year.

At the same time it assigned to Sutton, as trustee, a certificate of stock numbered 38, which it owned in the Western Associated Press, to secure the payment of said Bowman note.

On February 2, 1878, the said St. Louis Dispatch Company entered into a second mortgage conveying the above property to a trustee in trust to secure another loan made by it.

Under this second mortgage a foreclosure sale of all of the property described in the first mortgage took place on December 9, 1878, the sale so made being subject to said first mortgage and one Joseph Pulitzer being the purchaser.

It is further charged that at said time there was a

rival newspaper to the St. Louis Dispatch known as "The Post," of which John A. Dillon was owner and publisher; that on December 10, 1878, the said Dillon, owner of "The Post", and Joseph Pulitzer, purchaser of the St. Louis Dispatch, as aforesaid, consolidated the two newspapers, and on that day published the consolidated paper under the name of the "Post-Dispatch;" that on December 11, 1878, the said "Dispatch Publishing Company" was organized, and on that day the said Pulitzer and Dillon conveyed to it the two newspapers, "The Post" and "The Dispatch," which had been consolidated on the day previous, and thereupon the Dispatch Publishing Company entered into possession of all the personal property covered by the said mortgages, including the good will of the St. Louis Dispatch Company and the said certificate No. 38 in the Western Associated Press.

The paper issued by the Dispatch Publishing Company is, and has always been, known as the "Post-Dispatch," and was published for a number of years after the consolidation, in the same building formerly occupied by the St. Louis Dispatch Company.

The Dispatch Publishing Company paid interest on the said Bowman note from the first day of February, 1879, till the first day of December, 1879, being the same day on which it matured, but on that day refused to pay either principal or interest.

Complainant is alleged to be the legal holder for value of the note.

The bill states (Rec. p. 2) that the St. Louis Dispatch Company ceased active business as the publisher of a newspaper December 9, 1878, (which was the day on which the foreclosure sale took place under the second mortgage).

It is further charged that after the conveyance to the Dispatch Publishing Company of the property and franchises, as above stated, that it, for a time, received the

news, dispatches, etc., and enjoyed the rights and privileges formerly enjoyed by the St. Louis Dispatch Company by virtue of certificate No. 38, in the Western Associated Press, and paid the assessments on the same. This continued about a year when a new certificate (being certificate 64) was issued by the Associated Press to the Dispatch Publishing Company (Rec., p. 12). This last certificate was issued about December, 1880.

The old certificate, No. 38, was not surrendered to, nor cancelled by, the Associated Press, and is still in the hands of Sutton, the trustee. (Rec., p. 38; and see brief of complainant's counsel, pp. 33, 35 and 37.)

The assessments on the certificate have always been paid by the Dispatch Publishing Company (Rec. p. 13), and there is no averment in the bill of complaint, nor is it pretended that complainant ever paid, or offered to pay, any assessments on any of the certificates issued by the Associated Press.

The Bowman note having matured on December 1, 1879, and the Dispatch Publishing Company refusing to pay the same, thereupon Sutton, the trustee, demanded of it, the property of the St. Lonis Dispatch Company, including its good will and all its property recited in the first mortgage (Rec., p. 7), which the Dispatch Publishing Company wholly refused, and still refuses, to surrender.

The bill states that the Dispatch Publishing Company gradually used up or destroyed all the machinery, presses, type and other personal property received by it under the mortgage sale so that none remained on hand or in its possession at the time the Bowman note matured, December 1, 1879. (See Rec., pages 7 and 8.)

The by-laws of the Associated Press were filed by the complainant and made a part of the bill of complaint (Rec., p. 11), and are set out on page 27 *et seq.*, of the record.

We call the court's attention especially to the following:

By-Law II. "The evidence of membership shall consist of a certificate of one share of the capital stock of the association, which certificate shall be transferable only on the books of the association as hereinafter provided."

By-Law XII. "Any members selling or transferring his newspaper may transfer his certificate of stock to the purchaser or successor in the ownership of such newspaper and it shall be the duty of the secretary upon request to transfer the same on the books of the association to such purchaser or successor who shall then sign the articles of association and by-laws and become a member with the same rights and privileges as the original member.

"If any member shall discontinue the publication of a newspaper or shall sell his newspaper to another member, his membership shall cease and his certificate of stock shall be cancelled on the books of the association, and the treasurer shall refund to him the money paid to the association for the same."

By-Law XIII provides: "Any member may be suspended by the board of directors or may forfeit his stock for violating the by-laws or for any other act injurious to the best interests of the association."

By-Law XIV. "The board of directors shall have power to make assessments upon the members to defray the expenses incurred in collecting and transmitting intelligence and for other purposes not inconsistent with the charter and by-laws, and the board may discontinue the use of the news so collected to any member failing to pay promptly his assessment. Any member to whom the use of the news has been so discontinued may be re-admitted to the use of of the same *within six months of the time of such discontinuance* upon his refunding to the other members of the association in the same city or town such increased assessment as they may have paid in consequence of such discontinuance."

The prayer of the bill is that the Dispatch Publishing

Company be decreed to pay the complainant the sum of $15,000 with interest at the rate of nine per cent. per annum since October first, 1879, and to that end that the good will of the Dispatch Publishing Company be sold and also all personal property such as type, presses, machinery, etc., used by it in connection with its business; also that certificate No. 64, issued to the Dispatch Publishing Co. by the Western Associated Press, be sold to satisfy complainant's mortgage.

To the above bill a demurrer was filed by the Dispatch Publishing Company, which set out that the facts stated in the bill of complaint did not state a cause of action nor entitle complainant to the relief prayed for; that the good will of the Dispatch Publishing Company was a separate and distinct good will from that enjoyed by the St. Louis Dispatch Company and was not embraced in the mortgage under which complainant claims; that the Western Associated Press was a necessary party, and in its absence no foreclosure could be decreed of stock certificate No. 64, issued in favor of the Dispatch Publishing Company; that the cause of action set out in the bill of complaint was barred by limitation and that the complainant had been guilty of laches.

The cause was originally heard by Justice Brewer (then U. S. Circuit Judge for the Eighth Judicial Circuit) and Judge Thayer (District Judge), and on April 2, 1888, a written opinion was delivered concurred in by both of the above judges.

The decision was adverse to the complainant, and thereupon it amended its bill and on demurrer a final decree in favor of the defendants was rendered and the bill dismissed. (See opinion of Judge Thayer p. 37 of record.)

The complainant having appealed from said decree to this Honorable Court, a stipulation has been duly signed and filed of record in this court in words and figures as follows:

[Case No. 13,831.]

Supreme Court of the United States, October Term, 1892.

The Metropolitan National Bank of New York, appellant,

vs.

The St. Louis Dispatch Company, The Dispatch Publishing Company of St. Louis, and Henry L. Sutton, trustee.

Whereas, the corporate franchises of the Dispatch Publishing Company were, on the 14th day of June, 1892, by decree of the Circuit Court of the City of St. Louis, Missouri, declared forfeited, the corporation dissolved and its directors at the time acting made trustees in accordance with the statutes for winding up its affairs, a copy of the record and proceedings in the matter of said forfeiture being filed herewith and attached hereto, and

Whereas, the Pulitzer Publishing Company, a corporation organized and doing business under the laws of the State of Missouri immediately after entered into and is now in possession and claimed and now claim ownership of the newspaper St. Louis Post Dispatch, and have been and are now publishing the same, together with a membership in the Western Associated Press, acquired by it as the successor of the Dispatch Publishing Company in the ownership of the St. Louis Post-Dispatch newspaper, and all the property claimed and owned by the Dispatch Publishing Company at the time of its dissolution, and have succeeded to all the rights and liabilities of the Dispatch Publishing Company therein; the membership in the Western Associated Press herein referred to being represented by a certificate No. 93 issued in favor of the Pulitzer Publishing Company on April 2, 1892, the certificate No. 64 in the name of the Dispatch Publishing Company having been surrendered and cancelled cotemporaneously therewith; now, therefore, the said directors so acting for the Dispatch Publishing Company at its dissolution being C. Gibson

and W. L. Davis, and the Pulitzer Publishing Company do hereby assent to the making of an order herein whereby they shall be made parties defendant and do also consent and hereby enter their appearance as of the October Term, 1892."

POINTS AND AUTHORITIES.

1. A good will cannot be sold separate and apart from the property or business on which such good will depends for its life, value and support.

Robertson v. Quiddington, 28 Beavan (English),529.
Pomeroy's Equity Jurisp., 2d Ed., note 1, Section 1355.
Story on Partnership, Sec. 99.
Allan on Law of Good Will, pp. 14 and 88.

2. It is a fundamental principle of law that there can be no sale without a subject-matter.

There can be no sale of a good will if the good will has ceased to exist.

3. A mortgage cannot be foreclosed as to property which was never embraced in it and had no existence at the time of the execution of the mortgage.

4. If a newspaper appropriates the mortgaged good will of another paper, this at the worst is a wrongful conversion.

It has not the effect of extending the mortgage over property not embraced in it. At the most there would only be a liability for the value of such good will at the time of such conversion.

5. No relief can be granted for a wrongful conversion if the bill is not framed on that theory; nor can it be granted against a corporation where corporate franchises have become forfeited, nor if barred by limitation.

7. There is a material difference between a news-

paper called the "Dispatch" and one called the "Post Dispatch."

In any event the remedy for an illegal use of a trade-name is by injunction, and even such remedy may become barred by laches.

Even if conceded that name "Post Dispatch" was wrongfully used, this could not extend complainant's mortgage over the good will of the Dispatch Publishing Co., which was not embraced in the mortgage.

8. A demurrer admits facts well pleaded but not erroneous conclusions of law.

Interstate Land Co. v. Maxwell Land Co., 139 U. S. 569.
Fogg v. Blair, 139 U. S. 118.
Pennie v. Reis, 132 U. S. 464.

9. One who buys land "subject to a mortgage" is not *personally* liable for the mortgage debt, and even the payment of interest by such purchaser taken alone will not raise a personal liability.

Elliott v. Sackett, 108 U. S. 132.
Drury v. Hayden, 111 U. S. 223.
Hall v. Morgan, 79 Mo. 52.
Bush v. White, 85 Mo. 339.
Mason v. Barnard, 36 Mo. 385.
Fithian v. Monks, 43 Mo. 502.

10. Under the by-laws of the Western Associated Press complainant, on its own showing, is not entitled to a sale of any of the stock certificates, as there is no newspaper or good will which can be sold along with such certificates.

11. Limitation runs against the mortgagee, even in respect to mortgaged property, in case of adverse user.

Philippi v. Philippi, 115 U. S. 151.
Speidel v. Henrici, 120 U. S. 377.

Insurance Co. v. Reed, 24 How. 285.
Lewis v. Schwenn, 93 Mo. 26.
Booker v. Armstrong, 93 Mo. 49.
Gardner v. Jerry, 99 Mo. 524.
City v. Priest, 103 Mo. 562.

12. A court of equity is governed by the statutes of limitation.

Godden v. Kimmel, 99 U. S. 201.

13. A court of equity will not aid a party guilty of laches.

Speidel v. Henrici, 120 U. S. 387.
Societe Fonciere v. Milliken, 135 U. S. 304.
Lansdale v. Smith, 106 U. S. 391.
Wagner v. Baird, 7 How. 234.
Campan v. Vandyke, 15 Mich. 371.
Bank v. Burnam, 61 Mo. 76.
Bradshaw v. Yates, 67 Mo. 181.

14. Demurrer will lie on account of laches appearing on face of bill.

Speidel v. Henrici, 120 U. S. 387.
Richards v. Mackall, 124 U. S. 183.
Lansdale v. Smith, 106 U. S. 391.
Maxwell v. Kennedy, 8 How. 210.

15. No decree can be rendered in the absence of a party whose rights must be affected.

Railway v. Wilson, 114 U. S. 60.
Covion v. Millandon, 19 How. 113.
Gregory v. Stetson, 133 U. S. 586.
Ribon v. Railroad, 16 Wall. 446.
Shields v. Barrow, 17 How. 130.
Robertson v. Carson, 19 Wall. 94.
O'Hara v. McConnell, 93 U. S. 150.
Railroad v. Mills, 113 U. S. 249.
Thayer v. Life Ass'c'n, 112 U. S. 717.

16. No decree can be rendered for the sale of personal property which is not *in esse*.

Remedy for conversion of personalty is by an action at law for damages and not by proceedings in equity.

Buzard v. Houston, 119 U. S. 347.

Whitehead v. Shattuck, 138 U. S. 146.

BRIEF.

There are three main features which are presented by the bill in this case. First, the contention that arises out of the mortgaging of the good will of the old St. Louis Dispatch, and the subsequent consolidation with the Post, and the publication by the Dispatch Publishing Company of a new newspaper known as the Post-Dispatch. Secondly, the controversy pertaining to the press certificates in the Western Associated Press; and thirdly, the contention arising over the mortgaging of the personal property of the old St. Louis Dispatch, such as machinery, type, presses, paper forms, tools, etc.; and fourthly, limitation or laches.

We shall proceed to argue the questions arising herein; and first, whether the good will of the respondents can be subjected to complainant's mortgage.

Good Will of the Old St. Louis Dispatch Company Cannot be Sold.

It is evident that there can be no sale of the good will of the old St. Louis Dispatch Company, and we do not understand that the complainant is asking it.

First, no sale of a good will can be had separate and apart from the property or business on which such good will depends for its life, value and support.

This question was directly presented in case of Robertson v. Quiddington, 28 Beavan (English), 529. The testator, John Morgan, being a member of a mercantile partnership, composed of himself and the defendant Quid-

dington, devised a portion of his interest in the good will of the firm to the plaintiff Robertson. Quiddington had one-third interest and Morgan two-thirds at the time of his death, in the business.

The devise to Robertson was exclusively in the good will, and he received no interest whatever in the partnership property or stock in trade.

The executors had assigned the testator's share in the business premises to Quiddington.

The prayer of the bill was for the sale of the good will of the business, and that the plaintiff be decreed his proportion of the proceeds.

This brought up directly the question whether there could be a sale of the good will alone and separate from the business and property belonging to the firm and the Master of the Rolls decided in the negative. He says: "I fully concur in the observation on both sides, not only that the good will is a valuable and tangible thing in many cases, *but it is never a tangible thing unless it is connected with the business itself from which it cannot be separated, and I never knew a case in which it has been so treated.*

In Pomeroy's Equity Juris., 2 Ed., it is said (section 1355, note 1): "Independently of statute a good will by itself, without the business on which it depends, cannot be assigned."

See also Story on Part., Sec. 99, where it is said: "It (good will) is not, therefore, strictly speaking, a part of the partnership effects of which, upon a dissolution thereof, a division can be compelled, *unless, indeed, in cases where a sale of the whole premises and stock will be ordered.*"

In Allan on the Law of Good Will it is said, p. 14: "So intimately indeed is good will connected with the premises that in the case of Blake v. Shaw (Johns. 732), it was held that under a gift in a will 'of the plant and good will of my business,' the lease of the testator's house of business at a rack-rent passed to the legatee, inasmuch as

the good will was not severable from the premises." And on p. 88, same author says: "It is commonly said that the court will not execute an agreement for the sale of a good will standing alone, *but that if it is connected with the premises*, the contract for the sale of an interest in the premises and of the good will is a fit matter for a decree in a suit for specific performance."

In the light of the above authorities we insist that there can be no sale of the good will of the St. Louis Dispatch Company, because it is not averred in the bill nor stated in argument, nor is it pretended that the St. Louis Dispatch Company has any plant or place of business or anything that is tangible which can be sold in connection with its good will.

But there is another reason which stands as an insuperable barrier to any sale of the good will of that paper, *it is that there is no such thing in existence.*

There is not at the present time, and there has not been in many years, any existing entity known as the good will of the St. Louis Dispatch Company, and there exists nothing in respect thereto on which the decree of the court can operate.

The averments of the bill show that said company ceased active business as a publisher of a newspaper on December 9, 1878 (Rec., p. 2); that on the maturity of the note, to-wit: December 1, 1879, all of the personal property, presses, type, machinery, etc., acquired by the Dispatch Publishing Company from the old St. Louis Dispatch had been alienated, used up or destroyed. (Rec., p. 8.)

On page 45 of his brief complainant's counsel says: "The good will of a newspaper may be defined as or measured by its circulation and advertising patronage; the former indicated by its current daily sales and its subscription lists and the latter by its advertising contracts."

In many succeeding pages counsel reiterates that the good will of a newspaper grows out of its advertising patronage, its subscription lists and daily sales.

On page 7 of his brief, counsel further states that the Dispatch Publishing Company entered into possession not merely of the newspaper plant but the very building theretofore occupied by the St. Louis Dispatch Co., using the publishing and printing departments which had been used by the latter and all other property in all of its other departments connected with the publication of a newspaper; and it is further charged that it took possession of the subscription lists of the St. Louis Dispatch Company and its advertising contracts, carriers' route, etc., etc.

We now ask how there can be any existing good will to a newspaper which issues no publication and possesses no type, machinery or printing presses and is without even a place of business; that has no advertising patronage, subscription lists or daily sales; when this condition has existed for many years prior to the filing of suit and no paper known as the St. Louis Dispatch has been published since 1879. In Camden v. Stuart, 144 U. S. 105, it is determined that while the good will of a business may be the subject of barter and sale it must be something substantial and capable of pecuniary estimation and not shadowy.

In this connection the utterances of the Court in Wedderburn v. Wedderburn, 22 Beavan (English), p. 104, are very applicable.

"It (good will) varies in almost every case, but it is a matter distinctly appreciable which may be preserved (at least to some extent) if the business be sold as a going concern but which is wholly lost if the concern is wound up, its liabilities discharged and its assets got in and distributed."

On pages 44, 46, 81, and in other places of his brief (see also averments of bill, record, page 9), complainant's

counsel states that by the consolidation of the Post and Dispatch the good wills of the two became so inextricably confused as to be incapable of separation.

Assuming this to be true it necessarily follows that the good will of the one could not be sold without the other, and that therefore the Court cannot now decree a sale of the good will of the old St. Louis Dispatch *alone*.

Complainant's counsel seems to fully realize this and therefore asks the sale of the good will of the Dispatch Publishing Co.

His position in this respect is stated on page 46 of his brief as follows: "As the several good wills of the Evening Post and St. Louis Dispatch are unseverable and absolutely incapable of disconnection in such a manner as to determine the part each name had in creating or maintaining such circulation and advertising patronage it now has or ever had, the simple and the obvious thing to do with the view of foreclosing the mortgage on the good will acquired from the St. Louis Dispatch Company is to sell the good will and name, St. Louis Post-Dispatch."

There being no good will of the old St. Louis Dispatch Co. capable of sale, the question is therefore presented whether the good will of the Dispatch Publishing Co. can be sold to satisfy the mortgage.

THE GOOD WILL OF THE DISPATCH PUBLISHING COMPANY CANNOT BE SOLD TO SATISFY THE MORTGAGE.

The complainant's mortgage covered the good will of the St. Louis Dispatch. It did not embrace the good will of the Dispatch Publishing Company nor a certain newspaper issued by the latter known as the Post-Dispatch.

When the complainant's mortgage was executed there was no such company as the Dispatch Publishing Company in existence nor any newspaper called the Post-Dispatch.

We insist that the good will of the Dispatch Publishing Company was entirely and essentially different from

that of the old St. Louis Dispatch, and hence not embraced within the mortgage.

The facts as charged in the bill are that Jno. A. Dillon, owner and publisher of the Post, and Jos. Pulitzer, purchaser of the St. Louis Dispatch, consolidated the two newspapers on Dec. 10, 1878, and on that day published the consolidated paper under the name of the Post-Dispatch; that on Dec. 11, 1878, the Dispatch Publishing Company was organized and said Pulitzer and Dillon conveyed to it the two newspapers "The Post" and "The Dispatch" which had been consolidated on the day previous, and thereupon the Dispatch Publishing Company published the newspaper known as the Post-Dispatch.

It continued this publication till June, 1892, when its charter was forfeited under a *quo warranto* proceeding, instituted by the State of Missouri, at the relation of its Circuit Attorney (see stipulation).

Since said forfeiture and to the present time the Pulitzer Publishing Company, being the successor of the Dispatch Publisbing Company, has issued the publication known as the Post-Dispatch.

It appears from the above statement that the good wills of the Post and Dispatch were amalgamated on Dec. 10, 1878, and this joint good will conveyed to the Dispatch Publishing Company.

The bill was filed by the complainant on July 1, 1887.

The St. Louis Dispatch ceased business at the time of the foreclosure sale, to-wit: Dec. 9, 1878, and since that time has issued no publication and possessed no type, machinery, printing presses or the paraphernalia necessary to carry on a publication, and has not even had a place of business.

Therefore if it had conveyed its good will in 1878 to a separate concern and there had been no consolidation with any other newspaper, it is evident that the good will of the

separate concern, would, in 1887, be an entirely different good will from that derived some years previously.

This is necessarily true for the subscribers, advertising patronage and daily sales of the paper are continually shifting and changing.

The good will of a paper may be of little value to-day and in a few years worth an enormous sum by reason of the ability, industry and good management of those in charge.

It is a matter of common knowledge that the New York World, purchased by its present proprietor in 1883, for an inconsiderable sum, and with an insignificant circulation, became in the course of a very few years a paper of the first magnitude, and with the largest circulation in the country.

Will it be contended that the good will of the World in 1883, is the *same* good will it possesses to-day?

But the facts in the case at bar show that the daily paper which complainant is attempting to subject to his mortgage, not only varies in name from that mortgaged (the one being called the Dispatch and the other the Post-Dispatch); *but it was issued by an entirely different company, not in existence at the time of the execution of the mortgage.*

When the St. Louis Dispatch ceased business in 1878, its good will died. The good will built up between that time and 1887, by a separate and distinct company, issuing a paper of a different name must necessarily have been a different one. But we deny that in 1878, or at any other time, that the Dispatch Publishing Company's good will was subject to complainant's mortgage; that is to say, in its very inception the good will was different from the one embraced in the mortgage.

This is true, not merely because the paper was of a different name and issued by a different company from the one giving the mortgage, but also because the good will

veyed to it by Pulitzer & Dillon was the *joint* good will of two papers, the Post and Dispatch. In other words, the good will of the Dispatch had ceased as a separate entity prior to the above conveyance.

The Dispatch Publishing Company never received the good will as mortgaged. We quote in this connection from complainant's brief, p. 79: "As we before explained, the circulation and advertising attaching to a publication of a newspaper, composed of two formerly independent publications, could not be accurately designated as the product of either, nor could it be determined how much of that circulation was derived from the use of one name or of the other."

It must therefore follow that the good will of the combined papers is not the good will of either prior to the consolidation, and hence when the combined good will was conveyed to the defendant it was not the good will mortgaged to complainant.

It will be a departure from established principles of law to hold that a mortgage can attach to a good will not embraced in it; not in existence when it was executed, and when even the corporation whose good will is sought to be subjected, had no legal existence at the date of the mortgage. The good will of the old Dispatch died when it ceased publication, and the mortgage was upon it *alone*.

But there is a further obstacle in the way of the complainant to such relief.

As already stated the charter of the Dispatch Publishing Company became forfeited in June, 1892, in proceedings instituted by the State of Missouri at the Relation of the Circuit Attorney of the City of St. Louis, and as a corporation it became extinct. It thereupon ceased publication and it no longer possesses a good will, and the paper known as the Post-Dispatch has been published since then by the Pulitzer Publishing Company.

Will the court adopt the extreme view that the good

will of the Pulitzer Publishing Company is covered by the complainant's mortgage when the mortgage matured on December 1, 1879, and the Pulitzer Publishing Company was not organized till 1892?

The good will of the Dispatch Publishing Company cannot be sold because there is no such corporation, and, therefore, it cannot possess a good will.

Confusion of Good Wills.

A great deal has been said in complainant's brief about the confusion of good wills and on the theory of a wrongful intermixture of goods, complainant asks that the good will of the Dispatch Publishing Company be subjected to its mortgage.

We respectfully insist that the complainant's counsel is in error when he assumes that there was any confusion of the good wills at all. At most there was only a *wrongful conversion* rendering the wrong-doer liable in damages for the value of the good will at the time of the conversion (which right has since become barred by limitation as will be shown).

A wrongful appropriation of the good will of the old Dispatch could not extend complainant's mortgage to property which it never embraced.

Was the good will enjoyed by the Dispatch Publishing Company in 1887 (at the time of the filing of the bill) embraced in complainant's mortgage? Surely not.

Because the latter company years before made a wrongful appropriation, if you choose, of certain property rendering it liable in damages, will the mortgage thereupon attach to property never embraced in it and which in fact had no existence at the time of its execution? Because mortgaged property is converted, does the mortgage thereupon attach to property not embraced in it?

Complainant does not stop here, however.

The Dispatch Publishing Company, now being a defunct corporation, has no good will, and so complainants asks that his mortgage attach to the good will of the Pulitzer Publishing Company and the latter be sold to pay the mortgage debt.

It is manifest that this cannot be done.

Even if the theory advanced by complainant were tenable, and it be assumed that that there was not a conversion but a confusion subjecting the Dispatch Publishing Company's good will to the mortgage, still even then how could a decree be rendered against the good will of the Pulitzer Publishing Company?

Furthermore, the authorities cited in brief of counsel refer to a fraudulent intermixture of *goods, merchandise and tangible personal property.*

We insist that there can be no such intermixture of intangible property such as good wills, and that the rule has never been extended to such property.

It is not necessary to discuss whether a remedy existed in complainant's favor by reason of a wrongful appropriation of the mortgaged good will of the old St. Louis Dispatch Co.

No relief of the kind can be given for the following reasons:

First: The bill is not framed on any such theory and even the value of the good will at the time of the alleged conversion is no where alleged.

The whole gravamen of the bill is to subject the good will of the Dispatch Publishing Co. to the mortgage. There is nothing apparent on the bill seeking to hold the defendants liable for the conversion or appropriation of the good will of the old Dispatch.

Secondly: The court could not render a decree against the Dispatch Publishing Co., because its charter has been forfeited and it is no longer in existence; and also because

even if such a liability existed the remedy would be for damages for a wrong and the action would be *legal* and *not equitable*.

The court would grant no relief against the Pulitzer Publishing Co., because it is not charged nor is it pretended that it committed the wrong, and also if it had, the remedy would be at law and not in equity.

Thirdly: If any rights of the kind ever existed they are now barred by limitation.

The conversion took place, if at all, when the conveyance was made by Pulitzer and Dillon to the Dispatch Publishing Company, which was in December, 1878; or between that and the maturity of the note.

The note held by complainant matured Dec. 1, 1879. The bill was filed July 1, 1887.

So that even after the maturity of the note nearly eight years elapsed before the filing of the bill.

The statute governing the limitation of personal action in Missouri provides (see Revised Statutes, 1889, Vol. 2, page 1590, Section 6775), that actions shall be bought within five years "for taking, detaining or injuring any goods or chattels, including actions for the recovery of specific personal property, or for any other injury to the person or rights of another not arising on contract and not herein otherwise enumerated."

It is well settled law in Missouri that limitation applies to both equitable and legal actions, with only the difference that an equitable right may be barred in a period of time short of the time fixed by the statute by reason of laches, while a legal right is not barred till the full period of limitation has run.

Kelly v. Hurt, 74 Mo. 561.
Bradshaw v. Yates, 67 Mo. 221.
Spurloch v. Sproule, 72 Mo. 511.

It therefore follows that whether the right was legal or equitable the full period of limitation fixed by statute (five years) having run, it became barred.

USE OF NAME POST-DISPATCH.

Complainant's counsel says so much against the use of the name "Dispatch" in the publication issued by the defendants, that we wish briefly to make a few observations as to this: First, complainant assumes there is no substantial difference between "Dispatch" and "Post-Dispatch." This we deny. A hyphenated name, composed of two words, is radically different from a single name. This certainly should be held true as against complainant, for it did not only not object in its inception (December, 1878), nor at the maturity of the note (December 1, 1879), but waited nearly nine years (till the filing of this bill in 1887) before making any objection against the use of the name Post-Dispatch.

Surely it is inequitable for complainant to object at this late day, and it is apparent that any objection of the kind is a mere after thought.

Complainant recognizes that a remedy by injunction existed for any illegal infringement of the kind, for on page 55 of his brief he quotes a case directly in point (Bell v. Lock, 3 Paige, N. Y. 75), but no injunction was ever asked nor is one asked in this present proceeding.

But, for the sake of argument assume that the name Post-Dispatch is so similar in sound to the name Dispatch, that it was an infringement of the latter trade-name, in what way is complainant benefitted?

It is true on that hypothesis, waiving the question of laches, an injunction might have been maintained, but such an application was never presented, nor is complainant asking one in this proceeding.

A restraining order forbidding a violation of the trade-name is all that could possibly have been maintained, and

we utterly fail to see how the right to such restraining order, which has never been invoked, can aid complainant to foreclose on the good wills of either the Dispatch Publishing Company or the Pulitzer Publishing Company, which were not embraced in the mortgage.

On page 83 of his brief we understand counsel to contend that the mortgage not only attached to the property of the St. Louis Dispatch Company, which was mortgaged, but likewise attaches to the present plant of the Pulitzer Publishing Company and including all its machinery, type, presses, etc., etc.

He grounds this conclusion on the principle, that as a mortgage of a steam engine or a mill will attach to necessary repairs, that therefore complainant's mortgage will attach to any changes made in the original mortgaged plant, and that hence the court can subject the *present* plant of the defendants to the note held by complainant.

This is such a wild proposition that we think it does not merit serious discussion.

The Pulitzer Publishing Company had no existence till fifteen years after the execution of the mortgage; at the date of its execution the Dispatch Publishing Company was not in existence; all the tangible property of the old St. Louis Dispatch, as stated in the bill, was used up or destroyed at the maturity of the note, *i. e.*, December 1, 1879, and therefore the plant in the possession of defendants at the time of the filing of the bill, in 1887, was entirely different from that mortgaged; if the mortgage can now attach to the present plant, on the principle of "repairs," it is converted into a legal octopus, the like of which has never before been heard of in the law.

There is no averment in the bill, nor is it anywhere stated, that any of the property of the Dispatch Publishing Company was added to the plant of the old St. Louis Dispatch in the way of "repairs."

On the contrary it is shown that all the tangible prop-

erty of the latter had ceased to exist in December, 1879, and therefore the principle contended for has absolutely no application to the case at bar.

PAYMENT OF INTEREST BY THE VENDEE OF THE MORTGAGOR DOES NOT AMOUNT IN LAW TO A PERSONAL ASSUMPTION OF THE MORTGAGE DEBT.

While the bill charges that the Dispatch Publishing Company agreed and assumed to pay the mortgage debt, nevertheless it is an admitted fact that this was not by any express promise on the part of said Dispatch Publishing Company. The complainant's counsel seeks to show this assumption of the debt by reason of certain facts in the nature of an estoppel.

His position is set forth on page 86 *et seq.* of his brief, and is in brief this:

He states that at the mortgage sale the property was bid in by Simon Arnold, who conveyed to Jos. Pulitzer, who conveyed to the Dispatch Publishing Company and then it is said (see brief, page 86): "*These conveyances were not recorded and hence it is not known what were the terms of the several sales nor what the Dispatch Publishing Company agreed to do with reference to the former mortgage, nor in respect to any after-acquired property which it, the Dispatch Publishing Company, might add to or substitute in the plant. Nor could it be ascertained whether or not it assumed the payment of the mortgage debt as part of the consideration of the sale to it of the property.*"

Counsel then proceeds to state that interest was paid by the Dispatch Publishing Company in the time that intervened between the sale (Dec., 1878), and the maturity of the note (Dec. 1, 1879), and seeks to raise by reason of this fact an estoppel making the defendant personally liable for the mortgage debt. It is not pretended that there was a direct or express promise on the part of the defendants or either by them to pay the mortgage debt.

The statement in the bill that the Dispatch Publishing Company agreed and assumed to pay said mortgage debt is a mere legal conclusion grounded on certain facts in the nature of an estoppel set forth on page 86 *et seq.* of the brief.

A demurrer admits facts well pleaded but not mere conclusions of law, and the court will decide according to the legal conclusion flowing from the facts and not from an erroneous conclusion stated in the bill.

This doctrine is expressly held in the following cases:

Interstate Land Co. v. Maxwell Land Co., 139 U. S. 569.

Fogg v. Blair, 139 U. S. 118.

Pennie v. Reis, 132 U. S. 464.

But even if there were an express promise to pay, the remedy for breach of such promise would be by an action at law and not by a proceeding in equity (Buzard v. Houston, 119 U. S. 347).

But without entering into any special discussion on the point whether the remedy would be at law or in equity, we insist that the payment of interest on the mortgage debt before maturity could not raise an implied promise to pay the debt subjecting the defendant to a *personal* liability.

The only inference that can possibly be drawn from this is, that the defendant recognized the validity of plaintiff's debt as against the property *originally* conveyed to it subject to plaintiff's first mortgage. It is preposterous to maintain that the payment of interest on a first mortgage debt by the party who has acquired certain property subject to the first mortgage would render him personally liable for the entire debt. The utterly untenable position is taken by complainant's counsel that defendant be held liable by a judgment *in personam* for the entire first mortgage debt, irrespective of the

amount of mortgaged property received, or whether it equalled in value the mortgage debt.

The following authorities show the relation held by a purchaser under a second mortgage sale to the mortgagee in the first mortgage.

In Hall v. Morgan, 79 Mo. 52, it is held that one acquiring land by warranty deed "subject to an outstanding mortgage" would not be *personally* liable for the mortgage debt.

The court say.: "Unless the deed recites words importing on the part of the grantee a personal liability for the debt, such words as are quoted above will be regarded as a merely descriptive clause or one inserted as restrictive of the covenants of warranty from the grantor."

See also

Fitian v. Monks, 43 Mo. 502.
Mason v. Barnard, 36 Mo. 385.
Bush v. White, 85 Mo. 339.

It has been held by this Court that one buying premises subject to a mortgage does not thereby assume to pay it and the fact of the payment of interest to the mortgagee does not create a *personal* liability on the part of such purchaser.

In Elliott v. Sackett, 108 U. S. 132, a written contract was entered into between Geo. A. Sackett and Jno. A. Elliott, whereby they agreed to make an exchange of certain real property.

In the contract it was stated that Elliott was to receive a certain house and lot on Calumet avenue, in Chicago, subject to a mortgage on it for $9,000, in exchange of certain other property which Elliott was to deed to Sackett.

When the deeds came to be executed in pursuance of the contract, the deed from Sackett to Elliott for the Calumet avenue lot contained not only a provision that it was sub-

ject to the $9,000 mortgage, but also declared that Elliott assumed and agreed to pay the same.

Elliott afterwards filed a bill in equity to have the deed reformed, on the ground that the provision in which he assumed to pay the mortgage debt was inserted by a mistake.

The holder of the note on his petition was made a party to the suit, and filed a cross-bill asking a sale of the premises (there having been default in the payment of the note), and for a personal judgment for any deficiency against Elliott.

It was also shown that Elliott made two payments of interest on the mortgage.

The Court say, page 140: "An agreement merely to take land subject to a specified incumbrance is not an agreement to assume and pay the incumbrance. The grantee of an equity of redemption, without words in the grant importing in some form that he assumes the payment of a mortgage, does not bind himself personally to pay the debt. There must be words importing that he will pay the debt to make him personally liable. The language of the agreement in the present case does not amount to such an undertaking on the part of Elliott.

It is only a statement that the conveyance is to be subject to the incumbrance, and creates no personal liability in the grantee. Such is the law in Illinois where this land is situated: Comstock v. Hitt, 37 Ill. 542; Fowler v. Fay, 62 *Id.* 375; as well as the law in other States. Belmont v. Coman, 22 N. Y. 438; Fish v. Tolman, 124 Mass. 254.

Under the written agreement, therefore, it is plain that Elliott assumed no personal liability. * * * * (p. 142.) The fact that Elliott made two payments of the interest on the incumbrance is not inconsistent with his not having assumed the payment of the incumbrance.

As owner of the property subject to the incumbrance and desirous of retaining it so long as there was any value

in the equity of redemption, he would naturally pay the interest to save a foreclosure."

In Drury v. Hayden, 111 U. S. 223, the facts were these:

Solomon Snow, being the owner of certain land, executed a mortgage upon the same. He subsequently conveyed the same to William C. Snow, subject to the mortgage, and with a provision by which the latter agreed and assumed to pay it.

William C. Snow subsequently conveyed to one Daggett, subject to the mortgage, but without any stipulation that Daggett should assume and pay it. Daggett subsequently conveyed to one Drury subject to the mortgage, and the deed also stating that Drury agreed and assumed to pay the mortaage. *Drury after receiving the conveyance to him paid interest accrueing on the notes secured by the mortgage.*

The holder of the notes filed a bill of foreclosure and asked that a decree be rendered against Drury personally for any deficiency.

Drury defended on the ground that the clause in which he assumed to pay the mortgage was inserted in the deed by a mistake, and that the holder of the notes did not buy on the faith of his personal liability, and was not even aware of the existence of the deed to him or its contents.

This Court sustained this defense and held the decree of the court below subjecting Drury to a personal liability erroneous, and as to the payment of interest say (p. 227):

"The payment of interest on the mortgage notes would naturally be made by Drury to prevent a foreclosure of the mortgage on his land, and cannot be held to be an affirmance of an agreement of which he had no actual knowledge."

The Dispatch Publishing Company was a stranger to the complainant and no relation of trust existed between

them further than as to the property purchased at the mortgage sale. There was no personal relation between them whatever. While the Dispatch Publishing Company had no right to make direct misrepresentations to complainant, it is also true it was not in any way bound to look after complainant's rights, nor was it responsible if complainant foolishly drew erroneous inferences from certain facts.

It is not pretended or charged that the defendant said anything to deceive complainant, nor is it charged that there was any representation that it would be personally responsible for the debt, or that other property acquired by it from other sources and not embraced in the mortgage should be subject to the mortgage lien.

It simply paid interest prior to the maturity of the note but refused to pay thereafter principal or interest, of which complainant at the time had full knowledge.

The averment of the bill is (Rec., p. 7): "That at the time when said note matured the Dispatch Publishing Company refused to pay the same.

Whereupon trustee Henry L. Sutton demanded of the Dispatch Publishing Company the property of the St. Louis Dispatch Company, including its good will and all the property recited in said first mortgage, which Dispatch Publishing Company wholly refused and still refuses to surrender."

Assuming for the purposes of this argument the truth of the averments of the bill that the Dispatch Publishing Company had, before the maturity of the note, used up or sold the mortgaged property received by it, let us view the action of the complainant, as show by the record.

Counsel admits (see his brief, top of p. 93) that a suit for conversion of this property might have been maintained at the time; but instead of so doing complainant waited from that time, Dec. 1, 1879, till July, 1887, and then seeks to charge *all* the property of the Dispatch Pub-

lishing Company with the mortgage lien, and to obtain a judgment *in personam* against it for the mortgage debt, on the ground that interest had been paid on the note held by complainant prior to maturity.

No fraud is shown, no statements to complainant that there should be a personal liability, or that the mortgage lien should cover other property than that embraced in the mortgage; only that interest was paid, and this misled complainant to its damage.

Our answer is that defendant was not the guardian of the complainant, nor responsible for unwarranted inferences drawn by it. The truth is, this whole argument is an afterthought.

It is realized that it is impossible to satisfy complainant's claim out of the property of the old St. Louis Dispatch Co., and so it is attempted to attach the mortgage lien to the general property of the Dispatch Publishing Company, or the Pulitzer Publishing Company, or obtain a judgment *in personam* against them.

CERTIFICATES IN THE WESTERN ASSOCIATED PRESS.

It has already been shown that under the by-laws of the Western Associated Press (see by-law XII) that a member could sell his certificate of stock only in connection with the newspaper.

We call the court's attention to the following averments of the bill.

It is charged (see Rec., p. 11): "Your orator avers that a membership in the Western Associated Press is always represented by a certificate of a share of stock therein and that under the by-laws and constitution of said Western Associated Press, said membership is tenable and vendible only in connection with the publication of a newspaper or periodical, and in the manner laid down in the said constitution and by-laws which are herewith filed and

made a part of this complaint and marked Exhibits F & G. * * * And your orator further avers that under the by-laws and articles of incorporation aforesaid, the legal title to said certificate of membership aforesaid could never have vested fully in any individual, firm or corporation until, and after said individual, firm or corporation should have become the purchaser of the good will and property of said St. Louis Dispatch Company and as successor in right and liability to said company, and if after any sale whether of foreclosure or otherwise, the purchaser of said property did not continue a publication in connection therewith the said membership would become lifeless and valueless because a publication in connection with it was and is necessary to the sustenance of its life and value; that the said trustee and complainant herein have no rights in respect to said membership, except under said deed of trust, and can acquire no title thereto until a sale of the good will of the St. Louis Dispatch Company, now in possession of the defendant Dispatch Publishing Company, at which time the title intended to be conveyed to the complainant herein by said deed of trust would be effectuated to the purchaser of the good will and property of said St. Louis Dispatch Company."

By-law XII is as follows:

"Any member selling or transferring his newspaper may transfer his certificate of stock to the purchaser or successor in the ownership of such newspaper, and it shall be the duty of the secretary, upon request, to transfer the same on the books of the association to such purchaser or successor, who shall then sign the articles of association and by-laws, and become a member, with the same rights and privileges as the original member.

If any member shall discontinue the publication of a newspaper, or shall sell his newspaper to another member, his membership shall cease, and his certificate of stock shall be cancelled on the books of the association, and the

treasurer shall refund to him the money paid to the association for the same."

On p. 28 of his brief, counsel for complainant says: "These several by-laws were printed on the face of the so-called certificates of stock, so that every holder had notice thereof."

On p. 33 of his brief counsel says: "The certificate of membership was, at the date of the first mortgage or deed of trust, assigned for the purposes of the deed of trust to Henry L. Sutton, as trustee in said deed, and remained in his hands thereafter, but in such mode that *by no possibility* could any title to the membership have been divested out of the St. Louis Dispatch Company until a forfeiture and sale of the newspaper under said deed of trust, when, under the power of sale with which the deed invested him, the trustee could have sold and passed title to the newspaper, and at such sale delivered to such purchaser and successor in the ownership of said newspaper the certificate of membership; thus enabling such purchaser to comply with the requirements of by-law XII, and to become a member with the same rights and privileges as the original member."

It results from the foregoing that there are insuperable difficulties in the way to selling by decree any of the certificates (*i. e.*, certificates 38, 64, or 93).

First. No certificate can be sold except in connection with the newspaper and its good will.

We have, we think, already demonstrated that there is no good will or newspaper which can be decreed to be sold in this proceeding. The good will of the old St. Louis Dispatch cannot be foreclosed for two reasons—first, it has not had an existence for nearly fifteen years and therefore there is no subject-matter capable of sale; and secondly, on complainant's own showing was inextricably confused with that of the Dispatch Publishing Company, and incapable of being separated.

The good will of the Dispatch Publishing Co. and the Pulitzer Publishing Company cannot be subjected to the mortgage, not having been embraced within it. We have fully argued these questions already.

But the second difficulty that confronts complainant arises from that provision of by-law XII, which declares: "If any member shall discontinue the publication of a newspaper his membership shall cease."

It appears from the averments of the bill (see Rec., p. 12) that about one year after the Dispatch Publishing Company had been in possession of certificate No. 38, it procured the issuance of the new certificate No. 64. This would make it about 1879, as it came into possession of certificate No. 38 at the mortgage sale in December, 1878.

It is also averred that the old St. Louis Dispatch ceased publication on Dec. 9, 1878 (see Rec., p. 2). Consequently certificate No. 38 has had no publication to support it for nearly fifteen years. It cannot therefore be sold not merely because there is no newspaper or good will to be sold with it, but also because in the words of complainant's bill: "If after any sale of foreclosure or otherwise, the purchaser of said property did not continue a publication in connection therewith, the said membership would become lifeless and valueless, because a publication in connection with it was and is necessary to the sustenance of its life and value." Furthermore, it is held in the opinion of the court below (see Rec. p. 41), that certificate No. 38 was not mortgageable in the absence of consent on the part of the Associated Press, and it is not alleged that such consent has ever been given.

We do not understand however, that complainant is asking any sale of certificate No. 38.

LIMITATION.

We next insist that if complainant ever had a right to any relief in respect to certificate No. 64, the same is now barred by limitation.

This certificate was not embraced in the mortgage. It was issued to defendant, as already shown, about 1879. The relation of mortgagor and mortgagee did not exist between complainant and defendant in respect to it (it not being in the mortgage), and there was nothing in law to prevent limitation from running against complainant by reason of an adverse user. The surrender of the first certificate and the obtaining of the second, was, *ipso facto*, the assertion of an adverse claim by defendants.

It is well settled that limitation runs against the mortgagee *even in respect to mortgaged property*, in case of adverse user.

Philippi v. Phillppi, 115 U. S. 151.
Speider v. Henrici, 120 U. S. 377.
Insurance Co. v. Reed, 24 How. 285.
Lewis v. Schwenn, 93 Mo. 26.
Booker v. Armstrong, 93 Mo. 49.
Gardner v. Terry, 99 Mo. 524.
City v. Priest, 103 Mo. 652.

A fortiori, is this true in respect to property not embraced in a mortgage.

There is no question that certificate No. 64 has always been held adversely to any claim on the part of complainant.

It was not only not embraced in the mortgage, but it is charged that it was fraudulently issued to evade the mortgage. It has always stood in the name of defendant; the latter always paid the assessments on it and enjoyed the telegraphic dispatches by reason of its ownership, and it is not pretended that it has ever been in the possession of complainant.

It was issued, as already stated, about 1879, and this bill was filed in 1887. In other words, there were more than five and less than ten years of adverse user prior to the institution of this suit, and the question is thus presented, what period of limitation governs in this case.

The Missouri statute is as follow (see Rev. Stat. of Mo., 1889, vol. 2, p. 1590):

Section 6774. "What action shall be commenced within ten years. First, an action upon any writing whether sealed or unsealed, for the payment of money or property; second, actions brought on any covenant of warranty contained in any deed of conveyance of land shall be brought within ten years next after there shall have been a final decision against the title of the covenantor in such deed, and actions on any covenant of seizin contained in any such deed shall be brought within ten years after the cause of such action shall accrue; third, actions for relief not herein otherwise provided for. (R. S. 1879, Sec. 3229.)

Section 6775. What within five years—Within five years. First, all actions upon contracts, obligations or liabilities, express or implied, except those mentioned in section 6774, and except upon judgments or decrees of a court of record, and except where a different time is herein limited; second, an action upon a liability created by a statute other than a penalty or forfeiture; third, an action for trespass on real estate; fourth, an action for taking, detaining or injuring any goods or chattels, including actions for the recovery of specific personal property or for any other injury to the person or rights of another, not arising on contract and not herein otherwise enumerated; fifth, an action for relief on the ground of fraud, the cause of action in such case to be deemed not to have accrued until the discovery by the aggrieved party at any time within ten years of the facts constituting the fraud." (R. S. 1879, Sec. 3230.)

In Godden v. Kimmel, 99 U. S. 201, this Court held that in cases of concurrent jurisdiction courts of equity consider themselves bound by the statutes of limitations which govern courts of law.

We think an examination of the above sections makes it clear that this case falls within the fourth subdivision of section 6775 as follows: "Fourth, an action for taking, detaining, or injuring any goods or chattles, including actions for the recovery of specific personal property, or for any other injury to the person or rights of another, not arising on contract and not herein otherwise enumerated." Therefore the five year limitation governs.

We concede that the note held by complainant is not barred by the above statute till ten years; and should we even concede for argument's sake that the lien of the mortgage as to personal property embraced within it would not be barred, still we insist that as to certificate 64 (not embraced in the mortgage) the relief, if any, is barred in five years.

Any infraction of complainant's rights arises out of the action of the Western Associated Press in issuing the certificate to defendant, for if it had not been issued no cause of action could exist.

The defendant procured the certificate from the Associated Press and not from the mortgagor.

Certificate 64 and the action of the Associated Press in issuing it were independent of the mortgage and therefore the ordinary limitation of five years as to personal property governs.

Those cases cited by complainant's counsel to the effect that a mortgage may be foreclosed even after the debt has become barred by limitation have no application, because there can be no foreclosure of certificate 64 under the mortgage as it was not embraced in it. The cases referred to only give the right to foreclose *as to mortgaged property*

after the debt has become barred and have no application to property not embraced in the mortgage.

It also follows that if an indefeasable title vested in defendant in respect to certificate 64, that the title to certificate 93 issued in lieu of it could be no less perfect.

Should the court conclude that the question of limitation should be determined by the laws of Michigan on the ground that the stock in controversy was issued by a Michigan company, the complainant is left in no better plight.

The law of that State prescribes a six year limitation as to personal property and is as follow: (See Compiled Laws of Michigan, 1871, Vol. 2, page 1977, and Michigan Annotated Statutes, 1882, Vol. 2, pages 21, 31-2.)

"The following actions shall be commenced in six years next after the cause of action shall accrue and not after, that is to say: First. All actions of debt founded upon any contract or liability not under seal, except such as are brought upon the judgment or decree of some court of record of the United States, or of this or some other of the United States. Second. All actions upon judgments rendered in any court other than those above excepted.

Third. All actions for arrears of rent.

Fourth. All actions of assumpsit, or upon the case founded upon any contract or liability, express or implied.

Fifth. All actions for waste.

Sixth. All actions of replevin and trover, and all other actions for taking, detaining or injuring goods or chattels.

Seventh. All other actions on the case, excepting actions for slanderous words or for libels."

Complainant's counsel (see his brief, p. 103, *et seq.*) takes the position that there exists a distinction in law as to limitation in respect to real and personal property. That as to real property the title vests, but as to personalty only the right of action is barred.

We insist that it is not necessary to discuss the merits

of this contention. If certificate 64 was enjoyed by adverse user for five years this barred any right of action on the part of complainant.

While discussing the question of limitation we shall digress a little, and direct the court's attention to the tangible personal property of the old St. Louis Dispatch Company; any right to relief thereto being also barred by limitation.

It is not charged that any of that property is on hand, nor that it has been in existence since December 1st, 1879; the only ground to relief would be a wrongful appropriation of it on the part of the Dispatch Publishing Company.

Any claim for a wrongful conversion is obviously barred under the above statutes of limitation in five years.

The conversion, if any, under the allegations of the bill, took place prior to the maturity of the note (December 1, 1879), and the bill was not filed till 1887.

Hence the bar of the statute was complete prior to the filing of this suit.

LACHES.

We further insist that there can be no recovery on the part of complainant by reason of laches.

In this connection we call the court's attention to by-law XIV of the Associated Press (Rec. p. 30) as follows:

"The board of directors shall have power to make assessments upon the members to defray the expenses incurred in collecting and transmitting intelligence, and for other purposes not inconsistent with the charter and by-laws, and the board may discontinue the use of the news so collected to any member failing to pay promptly his assessment. Any member to whom the use of the news has been so discontinued may be readmitted to the use of the same within six months of the time of such discontinuance upon his refunding to the other members of the association

in the same city or town such increased assessment as they may have paid in consequence of such discontinuance."

The payment of assessments is the very ground-work of the existence of the Associated Press. The cost of procuring intelligence and transmitting news dispatches is defrayed by these assessments which is borne *pro rata* by the members. As shown above, when any member fails to pay his assessment, it is borne by the others.

It is not pretended that the complainant has ever paid a single assessment to the Associated Press, either on certificates 38, 64 or 93.

Complainant's mortgage matured in December, 1879, and in the fourteen years since not one assessment has been paid by it. Yet it is gravely contended that assessments paid by a party holding no trust relation to complainant, through a period of many years and on certificates not embraced within the mortgage, has kept alive the right of complainant, if any ever existed.

In the interval between the maturing of the mortgage and the filing of this bill—a period of nearly eight years—complainant did not turn its hand over; made no effort to enforce its rights, paid no assessments, allowed defendants to pay as though the certificates were unclouded by any adverse claim, and now at this late day insists that its lien has been preserved by what the defendants have done.

We insist that this is extremely inequitable and that the principles of laches clearly apply.

In Speidel v. Henrici, 120 U. S. 387, it is said: "Independently of any statute of limitations, courts of equity uniformly decline to assist a person who has slept upon his rights and shows no excuse for his laches in asserting them. A court of equity, said Lord Camden, has always refused its aid to stale demands where the party slept upon his rights and acquiesced for a great length of time.

Nothing can call forth this court into activity but conscience, good faith and reasonable diligence; where these

are wanting the court is passive and does nothing. Laches and neglect are always discountenanced, and therefore from the beginning of this jurisdiction there was always a limitation to suits in this court.

This doctrine has been repeatedly recognized and acted on here.

Piatt v. Vattier, 9 Pet. 405; McKnight v. Taylor, 1 How. 161; Bowman v. Wathen, 1 How. 189; Wagner v. Baird, 7 How. 234; Badger v. Badger, 2 Wall. 87; Hume v. Beale, 17 Wall. 336; Marsh v. Whittmore, 21 Wall. 178; Sullivan v. Railroad, 94 U. S. 906; Godden v. Kimmel, 99 U. S. 201.

In a very recent case (Société Foncière v. Milliken, 135 U. S. 304), an application to set aside a judgment on the ground that it covered usurious interest was denied by reason of laches, although the delay was but *two* years.

In Lansdale v. Smith, 106 U. S. 391, it is said: "It has been a recognized doctrine in courts of equity, from the very beginning of their jurisdiction, to withhold relief from those who have delayed for an unreasonable length of time in asserting their claims. Elmondorf v. Taylor, 10 Wheat. 152; Piatt v. Vattier, 9 Pet. 405; Maxwell v. Kennedy, 8 How. 210; Badger v. Badger, 2 Wall. 87; Cholmondelay v. Clinton, 2 Jac. and W. 1; 2 Story Eq. Jur., Sec. 1520. In Wagner v. Baird, 7 How. 234, it was said that long acquiescence and laches by parties out of possession are productive of much hardship and injustice to others and cannot be excused except by showing some actual hindrance or impediment caused by the fraud or concealment of the party in possession which will appeal to the conscience of the chancellor."

The same view denying relief to one who has slept upon his rights has been taken by the Supreme Court of Michigan (see Campau v. Vandyke, 15 Mich. 371), and the Supreme Court of Missouri (see Bank v. Burnan, 61 Mo. 76, and Bradshaw v. Yates, 67 Mo. 181), and we

believe the like principles obtain in all courts possessing equity jurisdiction.

The objection to complainant's bill on the ground of laches appearing on its face was duly taken by demurrer, (See Rec. p. 34.)

A party may demur on account of laches appearing on face of bill.

Speidel v. Henrici, 120 U. S. 387.
Richards v. Mackall, 124 U. S. 183.
Lansdale v. Smith, 106 U. S. 391.
Maxwell v. Kennedy, 8 How. 210.

Defect of Parties.

We next insist that there is an insuperable difficulty in the complainant's way as to these certificates by reason of the fact that the proper parties are not before the court.

The defendant filed a special demurrer on the ground that the Western Associated Press was a necessary party (see Rec. page 33), but complainant has always refused to make it one.

Counsel argues that the Associated Press is not a necessary party and then adds in *italics:* "*We have and desire no concern with the Western Associated Press.* (See his brief, page 37.)

This act of the Associated Press in issuing certificate 64 when certificate 38 was held by Sutton, trustee, and was outstanding and uncancelled is charged to have been fraudulent and we insist that the party chiefly concerned is entitled to be heard in its defense.

Fraud on the part of the Associated Press is directly charged.

Thus on page 38 of his brief, counsel says:

"But the undisputed fact that the certificate held by the Dispatch Publishing Company was issued to it as successor in the ownership of the St. Louis Dispatch newspa-

per makes it clear that the Dispatch Publishing Company made some representation to the association accounting for its failure to present it; and the facts set out in bill prove that the representations upon which the second certificate was issued and the name of the Dispatch Publishing Company placed upon its books *were and must have been false or fraudulent.*"

And on page 80 of his brief it is further said: "We have already, we hope, made manifest the difficulties which were made for us in connection with the membership by the unfair and fraudulent conduct of the Dispatch Publishing Company, whereby it received a certificate and became a member as purchaser or successor in the ownership of the St. Louis Dispatch newspaper before the old certificate was offered for cancellation.

Thus making it necessary if the old publication had been reinstated for the purchaser to enter into a legal contest with the Dispatch Publishing Company and the Western Associated Press to regain the undisputed ownership of the membership, etc."

It is clear that if certificate 64 was issued independently of certificate 38, and had no relation to it, that there would be no pretense for fixing the lien of complainant's mortgage upon it. The complainant is therefore driven to the position that it was issued in lieu of certificate 38 by unfair and fraudulent means.

The action of the Associated Press is necessarily impugned, and it is certainly entitled to be heard, and is a necessary party to this proceeding.

It has not only ignored certificate 38, but has also admitted a new corporation to its membership, under certificate 64, and is therefore interested in the present controversy and entitled to a hearing.

We refer the court to the case of St. Louis, etc.

Railway v. Wilson, 114 U. S. 60, as a case decisive of the point under discussion.

The facts were that Wilson, having obtained a judgment against the Seligmans of New York, purchased the stock standing in their name on the books of the St. Louis & San Francisco Railroad Company at execution sale. He then exhibited to the company his certificate of purchase and demanded that his name be entered on its stock books as the owner of said stock, which the company refused to do. Wilson thereupon brought a suit, in the State court of Missouri, grounded on the above facts against the Seligmans, citizens of New York, and the railroad company, a Missouri corporation. A petition was presented to the State court by the Seligmans for the removal of the cause to the Circuit Court of the United States on the ground "That there is in said suit a controversy wholly between citizens of different States, which can be fully determined between them without the presence of the defendant, the St. Louis & San Francisco Railroad." Upon this petition the State court removed the suit, but the Circuit Court of the United States subsequently made an order remanding it. To reverse this order of the United States Court an appeal was taken.

The appeal presented the point whether the railroad company was a necessary party to the proceeding, and in deciding it the Court say:

"There is but one controversy in this case and that is as to the duty of the railroad company to transfer to Wilson the stock standing in the name of the Seligmans on its books, and to issue new certificates therefor."

Upon the one side of that controversy is the plaintiff, a citizen of Missouri, and on the other the railroad company, a Missouri corporation. The sole purpose of the suit is to establish the duty and enforce its performance. This cannot be done without the presence of the company, for it is upon the company itself that the decree must op-

erate. The Seligmans are only made parties in aid of the principal relief which is asked.

As the stock stands in their names on the books, the company may well claim a judicial finding in the cause which shall bind them if upon the final hearing a transfer is ordered.

The suit is, therefore, in truth as well as in form, against both the company and the Seligmans on a single cause of action, and cannot be removed unless the separate answer of the Seligmans introduces a separate controversy. This we have held, in Louisville & Nashville Railroad Co. v. Ide, just decided, is not necessarily the effect of separate issues under separate defenses to the same action.

No relief whatever can be granted unless it is found to be the duty of the company to transfer the stock, and as to that controversy the company is an indispensable party (quoting) Central Railroad Company of New Jersey v. Mills, 113 U. S. 249; Thayer v. Life Association, 112 U. S. 717.

In Coiron v. Millandon, 19 How. 113, a sale of a plantation in Louisiana had been made under insolvency proceedings, and the suit was one filed by the heirs of the insolvent attacking the sale on the ground of certain irregularities.

The proceeds of the sale had been distributed to the creditors of the insolvent, and among others, to two non-residents of the State.

The purchasers of the plantation were made defendants, but the two non-resident creditors were not made parties.

The court held that the non-resident creditors had a legal interest in the controversy, because if the sale were set aside they would be obliged to refund the portion of the proceeds of sale they had received; that, therefore, they were necessary parties; and it was further held that the fact that they were non-residents of the State and out

of the jurisdiction of the court, was not a sufficient reason for omitting them as parties defendant. The gist of the opinion was that the Circuit Court cannot make a decree in the absence of a party whose rights must necessarily be affected by such decree.

In Gregory v. Stetson, 133 U. S. 586, it is said: "The rule as to who shall be made parties to a suit in equity is thus stated in Story's Eq. Pl. Sec. 72: 'It is a general rule in equity (subject to certain exceptions which will be hereafter noticed) that all persons materially interested, either legally or beneficially, in the subject-matter of a suit, are to be made parties to it, either as plaintiffs or as defendants, however numerous they may be, so that there may be a complete decree which shall bind them all.

By this means the court is enabled to make a complete decree between the parties to prevent future litigation, by taking away the necessity of a multiplicity of suits, and to make it perfectly certain that no injustice is done either to the parties before it, or to others who are interested in the subject-matter by a decree which might otherwise be grounded upon a partial view only of the real merits.

When all the parties are before the court the whole case may be seen; but it may not where all the conflicting interests are not brought out upon the pleadings by the original parties thereto."

(The court then proceeds:)

"In the case before us we are unable to see how any final decree could be rendered affecting the parties to the contract sued on without making them all parties to the suit. It is an elementary principle that a court cannot adjudicate directly upon a person's right without having him either actually or constructively before it. This principle is fundamental. * * * * The point was made in the court below, and is also pressed here, that Mrs. Pike being a non-resident and beyond the jurisdiction of the court, it was impossible to join her as a party defendant to the suit,

and that it was unnecessary, therefore, to attempt to do so. The court below ruled against the complainant on this point and we see no error in that ruling.

The general question involved therein has been before this court a number of times, and it is now well settled that notwithstanding the statute referred to, and the 47th equity rule, a Circuit Court can make no decree in a suit in the absence of a party whose rights must necessarily be affected thereby."

We refer the court to the following additional authorities, that no decree can be made in the absence of a party whose interests would be materially affected thereby:

Ribon v. Railroad Company, 16 Wall. 446.
Shields v. Barron, 17 How. 130.
Robertson v. Carson, 19 Wall. 94.
O'Hara v. McConnell, 93 U. S. 150.
New Jersey Railroad v. Mills, 113 U. S. 249.
Thayer v. Life Association, 112 U. S. 717.

If it be conceded that certificate 38 was mortgageable (the opinion of the court below was adverse to complainant on this point), it may be that the action of the Associated Press in issuing a new certificate without a cancellation of the old one was an infraction of complainant's rights, for which the law provided an adequate remedy, in a proper proceeding instituted for that purpose, to which the Associated Press was a party; but this gives no legal foundation for the foreclosure, under a mortgage of property not embraced within it.

POINTS MADE BY COMPLAINANT'S COUNSEL ANSWERED.

Complainant's counsel advances the following argument: He refers to the mortgage lien, which he claimed attached to certificate No. 38 in favor of complainant; to the sale of that certificate to the Dispatch Publishing Com-

pany with notice of the mortgage lien. The claim is then made that the lien attaches to certificate 64 *on the ground that it is the identical membership that was mortgaged.*

The error of this assumption is manifest, because it is the fact that each certificate represents a separate and distinct membership.

By-law II of the Associated Press (see Rec., p. 27) conclusively shows this to be the fact.

It is as follows:

"The evidence of membership shall consist of a certificate of one share of the capital stock of the association, which certificate shall be transferable only on the books of the association, as hereinafter provided."

It therefore follows that each certificate represents a separate membership, and the membership mortgaged to complainant was a different one from the one represented by certificate 64.

Consequently the lien of complainant's mortgage never attached to certificate 64, and *a fortiori* is this true as to certificate 93.

It is not necessary to discuss the right of the association to issue certificate 64 without the surrender and cancellation of certificate 38, nor if such action were illegal what remedies existed in favor of complainant.

That question is not before the court on the present record. The right of action, if any, was against the Associated Press, and it is no party to this proceeding; moreover, the remedy would now be barred by limitation. (See *ante* p. 34 *et seg.*)

On p. 30 of brief, counsel after contending that certificates 38 and 64 represented the same membership claims that complainant's rights in it have been "maintained" by the defendants.

That is to say, the complainant has published no newspaper as required by the by-laws nor paid any assessments in fifteen years, and yet gravely contends that his rights

through this long period of time have been maintained by defendants.

Those principles of estoppel which counsel has adverted to again and again in his brief, if applied to complainant's conduct clearly preclude any relief.

As to Tangible Property such as Machinery, Type, Presses, etc.

In the bill filed by complainant (see Rec. p. 7), it is averred: "That at the time of said notes' maturity and the demand for payment of same and of trustees making such demand, said Dispatch Publishing Company had alienated, destroyed or gradually used up all the machinery, type, presses and property of a perishable nature of the said St. Louis Dispatch Company" * * * * * ; "but your orator avers that from time to time it substituted new paraphernalia for publishing said newspaper, and that in the conduct of said business in the stead of the property so acquired, and during the year 1879 from January to December thereof, and whilst the Dispatch Publishing Company was paying the interest on said debt, and until the maturity of the note aforesaid, the defendant Dispatch Publishing Company had thus placed in the building where said newspaper was published, to-wit: 111 N. 5th street, new presses, type and machinery, *and that on that date it had none of the original presses, type and paraphernalia for printing a newspaper described in said mortgage.*"

A. It is evident therefore that the tangible property embraced in the mortgage has not been *in esse* since Dec. 1, 1879 (the date of the maturity of the note), and therefore no decree of foreclosure can be given as to it as it has not been in existence for nearly 14 years.

B. There is nothing on which to invoke the rule as to the fraudulent admixture of personal property, because it is not charged that it was wrongfully commingled with

other after acquired property, either by the mortgagor or purchaser under the second mortgage, so as to become undistinguishable.

The allegation is that it was alienated or gradually used or worn out by use before the first mortgage matured.

Besides if there had been a commingling it is not shown that there could not have been a separation, nor is there any allegation as to a fraudulent intent in this respect.

C. Without discussing what complainant's rights may have originally been, it is certain at the present time no relief can be granted for the value of the personal property embraced in the first mortgage and which the Dispatch Publishing Company is alleged to have appropriated. This is so for several reasons: First. The Dispatch Publishing Company has no present legal existence, and, therefore, no decree can be rendered against it.

Secondly. The bill is not framed on the theory of charging the Dispatch Publishing Company for the value of the mortgaged chattels, on the ground that it wrongfully converted them to its own use.

It does not describe the tangible property with any certainty, nor specify its value nor pray for an accounting as to the same nor for an ascertainment of the value of such property.

Consequently any such relief is not within the scope of the bill.

Thirdly. Right to relief of the kind, if it ever existed, is now barred by the statute of limitations.

Complainant's remedy would obviously be barred under the fourth subdivision of section 6775 of Revised Statutes, 1889, of Missouri, which is a re-enactment of the Revised Statutes of 1879, and which has already been adverted to on page 34 *et seq.* of our brief, and providing a five year limitation for "an action for taking, detaining or injuring any goods or chattels, including actions for the recovery of

specific personal property, or for any other injury to the person or rights of another not arising on contract and not herein otherwise enumerated."

The fact that the present action is in equity and not at law does not alter the case, for courts of equity follow by analogy the limitation prescribed at law.

Kelly v. Hurt, 61 Mo. 466.
Bradshaw v. Yates, 67 Mo. 221, 232.
Kelly v. Hurt, 74 Mo. 562.
Bliss v. Pritchard, 67 Mo. 181.
Godden v. Kimmel, 99 U. S. 201; 95 U. S. 200; 16 Wall. 390.

Fourthly. Relief, if any, must be had by suit at law and not by proceedings in equity.

The remedy for the conversion is by action for damages at law and not by proceedings in equity.

As decisive of this we refer the court to Buzard v. Houston, 119 U. S. 347; and Whitehead v. Shattuck, 138 U. S. 146.

We, therefore, respectfully submit that there is no property *in esse* subject to complainant's mortgage, nor any relief which can be given at the present time or in this proceeding, and, therefore, the decree of the lower court is right and should be affirmed.

C. GIBSON, AND
C. E. GIBSON,
Solicitors for Respondents.

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1892.

THE METROPOLITAN NATIONAL BANK OF NEW YORK,
APPELLANT,
vs.
THE ST. LOUIS DISPATCH CO., THE DISPATCH PUBLISHING COMPANY, THE PULITZER PUBLISHING CO., AND HENRY L. SUTTER, TR.,
RESPONDENTS.

Term No. 224

Reply to Respondents' Brief and Argument.

JOHN M. DICKSON,
For Appellant.

Nixon-Jones Printing Co., 215 Pine Street, St. Louis.

IN THE

Supreme Court of the United States.

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RESPONDENTS.
Term No. 724.

Reply to Respondents' Brief and Argument.

We will reply to respondents' brief by topics and without reference to the order followed by counsel.

We first re-present our argument on the membership in the Western Associated Press, in connection with defendant's objection to our bill upon the ground of defect of parties.

"Any member," says the by-law of the Western Associated Press, "selling or transferring his newspaper, may

transfer his certificate of stock to the purchaser or successor in the ownership of such newspaper, and it shall be the duty of the secretary, upon request, to transfer the same on the books of the association to such purchaser or successor, who shall then sign the articles of association and by-laws and become a member with the same rights and privileges as the original member." By-law XII. W. A. P. Ex. F. & G.

"* * * No *new* member shall be admitted without the unanimous consent of the members in the city or town where his business is carried on." By-law XV. W. A. P. Ex. F. & G.

Nothing is clearer than this: that no person or corporation can become a member of this association, unless he is

1st. The purchaser or successor in the ownership of the *original* member's newspaper, or

2d. Unless the applicant has procured "the unanimous consent of the members in the city or town where his business is carried on."

The complaint alleges, what is not only true, but also what the defendant expressly admits by demurring to the bill, "That * * * one year after the Dispatch Publishing Company had been in the daily use and enjoyment of the membership, then and for many years prior thereto, standing on the books of the Western Associated Press in the name of the St. Louis Dispatch Company, and represented by certificate No. 38, the Dispatch Publishing Company applied to said association for issuance to it, *as the purchaser of the St. Louis Dispatch Co.'s newspaper* and all appurtenant property and as the successor in right and liability to the St. Louis Dispatch Company, of a new certificate and to have its name placed upon the books of the association as a member in succession and right to the said St. Louis Dispatch Company, and as the purchaser of the said St. Louis Dispatch Company's good-will and appurte-

nant property; *that the Western Associated Press did issue to defendant Dispatch Publishing Company a new certificate representing the membership in the name of the St. Louis Dispatch Company, and did place the* name of the Dispatch Publishing Company upon its books as a member *in virtue* and *in virtue only of the right acquired by said Dispatch Publishing Company as a successor to said Dispatch Publishing Company and as a purchaser of the St. Louis Dispatch Company's newspaper*, and succeeding to that company's right to hold the same, subject to the same liabilities and conditions as attached to said membership in the hands and in the name of the St. Louis Dispatch Company."

"That the membership represented by certificate 64 is and was at all times aforesaid *the same membership as that represented by certificate 38*." p. 12 of record.

The defendant then admits it acquired its rights in the membership "as the purchaser or successor in the ownership of" the newspaper of the St. Louis Dispatch Company, to wit, the St. Louis Dispatch newspaper.

Why it was the company failed to demand of defendant, certificate 38 before it issued certificate 64 we do not know and as we have stated so often before we do not care. It is sufficient for us to know that defendant has the identical membership coming to it in virtue of its purchase of the St. Louis Dispatch newspaper under a second mortgage subject to our first, from the St. Louis Dispatch Company.

It will be at once realized by recurrence to the by-law "Any member selling or transferring his newspaper may transfer his certificate of stock to the purchaser or successor in the ownership of such newspaper, etc.," that no transfer of a certificate would confer any rights *as against the association* unless and until the transferee of the certificate succeeded to the ownership of the original holder's and member's newspaper.

It is perfectly apparent, that any attempt to make a transfer of a certificate before the actual sale and delivery of the newspaper, would be absolutely abortive, and so far from conferring immediate rights upon the transferee, the transfer would be without effect (except between the parties) and *an absolute transfer of the certificate before the absolute sale and delivery* of the newspaper, might and probably would forfeit the holder's membership altogether. Let us therefore ascertain what was the effect of the contract embodied in the deed of trust (being our first mortgage) upon the membership. No one ever pretended that this instrument conveyed to the mortgagee any *immediate right against the association* to demand a transfer; not even after the condition of the deed was broken, *until indeed the trustee for the beneficiaries entered into possession* "as purchaser or successor in the ownership of the newspaper," when having the certificate of the original member duly transferred to him "for like purposes as other property" described in the deed, the trustee could sell the newspaper under the terms of the deed and deliver to the purchaser the certificate transferred to him for the very object, viz., to enable such "purchaser of the newspaper," to have the membership transferred to him as the "purchaser or successor in the ownership of such newspaper."

The intent of the mortgagor and other parties to the deed or contract, is therefore perfectly clear.

The purpose of the deed was to affix an equitable lien or mortgage upon the membership in the mortgagor's hands and in the hands of the grantees of the mortgagor. The certificate transferred to Sutton "for like purposes" as those contained in the deed, was something done to aid in the effectuation of the mortgagor's purpose of assuring to the purchaser, in the event of foreclosure, the membership with the newspaper. We are sure that if a mortgagor of a newspaper, expressly contracting therein to hold his mem-

bership charged with the lien of the mortgage, should withhold his certificate from the mortgagee or trustee, that such act would not defeat the mortgagee's remedy, if in a proceeding in equity to foreclose, he asked for an order directing the mortgagor to transfer to the purchaser at the foreclosure sale, the certificate, which, in the hands of such purchaser, would be the one additional act, incumbent upon the mortgagor, to perform, for the full and complete performance of the agreement he had made in his deed. It being thus made clear that the only purpose (and effect, for that matter) of the assignment to the trustee of certificate 38 "for like purposes as the deed" was to aid the trustee to effectuate the contract or agreement of the grantor (seeking to charge his membership with the lien of the mortgage) in completing the purpose of the grantor by delivering for the grantor to the purchaser of the newspaper the certificate (which the grantor had himself bound himself to do); we feel sure the atmosphere has been sufficiently cleared to direct our gaze a little askance.

Our assertion therefore is, that if any deed of mortgage sufficiently expresses the intention, upon default, to transfer, with the newspaper, the membership of the mortgagor, a court of equity will effectuate that intention so far as it can. As the mortgagor in this instance sought to charge his membership with the same lien he sought to fix upon its newspaper; and as a court of equity, if it would effectuate the grantor's intention at all, would do it, irrespective of whether or not the mortgagor had transferred for the purposes of the contract expressed in the deed, to the mortgagee or trustee, the former's certificate, because, as we have shown, the transfer of the certificate before default, and before "delivery of the newspaper" conferred in itself no right against the association.

If the mortgagor of a newspaper, seeking therein to charge also his membership with the mortgage lien, should

not at any time, deliver his certificate to the mortgagee or trustee, would it be necessary, when after default the mortgagee filed his bill to foreclose his mortgage lien upon the newspaper, asking also for such orders as would effectuate the apparent purpose of the mortgagor in reference to the membership — to join the Western Associated Press in order to acquire from the mortgagor — not his membership (for until a proved purchaser of the mortgagor's newspaper appeared, no tranfer of a certificate would confer rights against the association) but the certificate of membership, the possession of which *by the purchaser at the foreclosure sale*, would enable the latter to become a member of the association, by exhibiting together, the proofs of his qualification, to wit: the ownership of the *original member's newspaper and the possession of the original member's certificate*.

The point made by defendant is that there is

A DEFECT OF PARTIES,

because complainant failed to join the Western Associated Press. We have purposely put the case in the form we have, so as to determine whether it would have been necessary to join the W. A. P. in a proceeding to foreclose the mortgaged property, when it was in the hands of the mortgagor, *assuming that the mortgagor had in his own possession the certificate*, and was in the jurisdiction of the court.

The sale of the certificate is sought to effectuate the mortgagor's contract not quoad the corporation, but quoad the contract itself, necessarily implied in which is the obligation to deliver the newspaper and the certificate (whatever number it may be) representing the membership. The Western Associated Press has absolutely no interest in the controversy, because the mortgagee is not seeking to have

its name placed upon the books as a member (the transfer of the certificate before complete sale and delivery of the newspaper would not give it this right), but it is only asking for the sale of the certificate with the newspaper, so as to effectuate the mortgagor's expressed intention and to give to the purchaser at the sale of the newspaper the certificate, which the by-laws say may be transferred, and may be transferred *at no other time or manner*, except "when the member sells or transfers his newspaper," *i. e.*, *completes* the sale or transfer of his newspaper. The sale by the mortgagor of his newspaper is completed, of course, only when the mortgagee takes possession after default, or when the complete divestiture of title is effected by *a foreclosure sale*. And it cannot be supposed that the mortgagor intended to do more than it was possible for him to do, when he made the contract embodied in the deed (assuming there was no conditional transfer of a certificate), viz., not only to deliver a newspaper and a certificate, but to go to Michigan and procure the transfer of the membership on the books of the company. The agreement was to do only those things which it would be necessary for it to do if, instead of making a mortgage, it was making an outright sale. Or what it would be necessary for it to do, under a proper decree in equity rendered for the specific performance of a contract to transfer or sell the newspaper and "any and all shares by it owned in the Western Associated Press," or "its interest in the Western Associated Press." Having in view the by-law no sane man would think it necessary to join the association, in a bill to compel the specific performance of such a contract. Because the contract is made with reference to the peculiar by-laws of the association, and it is known to the contracting parties (or presumed to be known) at the time of the contract, that the person agreeing to sell can, from the intrinsic nature of the transaction, in performance of such agreement, do only two

possible things, viz., deliver the newspaper and transfer the certificate.

In other words the only possible construction to be placed upon the agreement, is that it is an agreement to deliver the newspaper and to transfer the certificate.

Nothing could fall so far short of supporting defendant's contention, as the case St. L. &c. R. Co. *v.* Seligman et al., 114 U. S. 60. The defendant states the facts of the case thus: "The facts were that Wilson having obtained *judgment against* the Seligmans of New York, *purchased the stock* standing in their name on the books of the St. Louis & San Francisco Railroad Co., *at execution sale.* He then exhibited to the company his certificate of purchase and demanded that his name be entered on its stock books as the owner of said stock, which the company refused to do. Wilson thereupon brought a suit in the State court of Missouri, grounded on the above facts, against the Seligmans, *citizens of New York*, and the railroad company, a Missouri corporation." The case was removed to the U. S. circuit court and by that court remanded to the State court upon the ground that the necessary party defendant was the railroad and the Seligmans parties only "in aid of the principal relief."

"There is," says the Supreme Court of the United States in passing upon the appeal from the order of the lower court, "but *one controversy* in this case, *and that is as to the duty* of the *railroad company* to transfer to Wilson *the stock standing in the name of the Seligmans on its books*, and *to issue a new certificate therefor.* * * * The sole purpose of the suit is to establish the *duty* and *enforce its performance.* This" (*viz., the transfer of the stock on the books of the company*), "cannot be done without the presence of the company, for *it is upon the company itself that the decree must operate.* The Seligmans are only made parties *in aid of the* principal relief asked.

* * * No relief whatever can be granted unless it is found to be the duty of the company *to transfer the stock*, and *as to* THAT *controversy* the company is an indispensable party."

The defendant must, in his mind, have relied upon this case in support of his contention that the W. A. P. is a necessary party defendant, because he quoted it at length. Need I say it bears no analogy to any statement of our case made by the defendant or myself?

The Western Associated Press is in no sense a party to this controversy. It appears from the averments that we are seeking to foreclose a mortgage lien on a newspaper (good-will) and to effectuate an agreement contained in the mortgage, whereby the mortgagor impliedly agreed to transfer the certificate representing his membership in the Western Associated Press to the mortgagee, after default and entry into possession, or to the purchaser at the foreclosure sale. To this end no orders upon the W. A. P. are necessary, and to this end only one thing is necessary, namely, the order upon the mortgagor, to transfer upon the sale of the newspaper the certificate to the purchaser of said newspaper. If the purchaser of the newspaper, after the certificate is delivered to him, fails to procure, upon proper application and upon offering to comply with the formal requirements of the W. A. P., from the latter a transfer of the original member's membership and a new certificate, a case would be made bearing an analogy to defendant's citation; or if the defendant refused to surrender or transfer his certificate to the purchaser, under the court's decree at the sale of the newspaper, the purchaser could then take such action against the mortgagor and the Western Associated Press for a cancellation of the outstanding certificate and the transfer of the former member's share to itself, as it might deem fit. But

the occasion has not arrived, and cannot arrive until some person shall buy the newspaper.

Weaver *v.* Fisher, 110 Ills. 146, cited p. 40, our brief, fully supports our contention. "It will be time enough," it is stated by the court, "*to make it a party when a decree is sought against it. Whether the party to* whom the defendant in error desires the certificate *to be assigned will be acceptable to and received by the Board, cannot in any possible way concern the plaintiff in error.*"

The other cases cited by defendant are not in point.

We have shown that in the hands of the mortgagor making the contract expressed in our first mortgage, the court would, in a proceeding to foreclose, decree the sale of the newspaper and the certificate representing the membership, at the time owned by the mortgagor.

We now extend the proposition so as to include not only the mortgagor, but purchasers of the mortgagor with notice of the deed and the contract contained therein, seeking to affect with the mortgage lien the mortgagor's membership. In other words, the Dispatch Publishing Company, purchaser of the newspaper, subject to the mortgage, with full notice of the equities affecting the membership, and coming into possession of such membership distinctly as the "purchaser and successor in the ownership of the St. Louis Dispatch Company's newspaper, the St. Louis Dispatch," holds the certificate delivered to it, in that right, subject to the equitable lien fixed upon it by its grantor.

As we have repeatedly affirmed, it is of no consequence, what certificate it holds, if only the certificate is representative of the membership defendant acquired as the purchaser or successor in the ownership of the mortgagor's (original member's) newspaper. This being conceded by the pleadings (and being certain from the internal evidence of the transaction itself), it follows that the certificate 64 held by the D. P. Co. (and it is alleged to be and not denied), is

representative of the membership transferred to defendant, as the successor in the ownership of the St. Louis Dispatch newspaper. And so certificate 93 in the hands of Pulitzer Publishing Company.

It therefore follows that if there is in hands of D. P. Co. the newspaper it purchased from the St. Louis Dispatch Co. subject to our first mortgage, or a newspaper which, upon any of the principles cited in our former brief, pp. 41, 42 and 43, pp. 62 et seq. or pp. 71 et seq., the court *will hold to be the same*, then the court, in its decree of foreclosure, directed against the D. P. Co. for the sale of newspaper in its hands (declared to be subject to the mortgage), would order the transfer of the certificate, representing the membership, it admits it acquired as the purchaser or successor in the ownership of the "original member's" (mortgagor's) "newspaper."

This conclusion irresistibly follows — if the newspaper (good-will) in the D. P. Co.'s hands is declared to be the newspaper (good-will) purchased by it from the mortgagor, it being undisputed that the membership it enjoys and holds now is the identical membership it acquired from the St. Louis Dispatch Company as "the purchaser of its newspaper" at a sale thereof under a second mortgage, subject to our first, it is submitted that the Pulitzer Publishing Company is in precisely the same situation as its predecessor, the Dispatch Publishing Company, both as regards the newspaper and the membership.

STIPULATION.

"Whereas the corporate franchises of the Dispatch Publishing Company were on the 14th day of June, 1892, by decree of the Circuit Court of the city of St. Louis, Missouri, declared forfeited the corporation dissolved and its directors at the time acting made trustees in accordance with the

statute, for the purpose of winding up its affairs, a copy of the record and proceedings in the matter of said forfeiture being filed herewith and attached hereto.

AND WHEREAS THE PULITZER PUBLISHING COMPANY, a corporation recently organized and doing business under the laws of the State of Missouri, immediately after the entry of the said decree, entered into and is now in possession, and claimed and now claims the ownership of the newspaper, St. Louis Post-Dispatch, and has been and is now publishing the same, together with a membership in the Western Associated Press acquired by it as the successor of the Dispatch Publishing Company in the ownership of the St. Louis Post-Dispatch newspaper, and the property claimed and owned by the Dispatch Publishing Company at the time of its dissolution, and have succeeded to all the rights and liabilities of the Dispatch Publishing Company therein; the membership in the Western Associated Press herein referred to being represented by a certificate numbered 93, issued in favor of the Pulitzer Publishing Company on April 2nd, 1892, the certificate numbered 64 in the name of the Dispatch Publishing Company having been surrendered and cancelled cotemporaneonsly therewith.

Now, THEREFORE, the said directors so acting for the Dispatch Publishing Company at its dissolution, being and the Putilizer Publishing Company, do hereby consent to the making of an order herein, whereby they shall be made parties defendant, and do also consent to and hereby enter their several appearances of the October Term, 1892."

It does not seem to be disputed that the membership may in equity be subjected to the lien of a mortgage, or to payment of debts of the member. (see brief of appellant, pp. 16, 20, 21, 22 and 23 and brief of defendant, where no mention even is made of the proposition).

Nor is the proposition denied that "a court of chancery, in the exercise of its general jurisdiction, will assist a judgment or specialty creditor to reach and apply to the payment of his debt "any property" of the judgment or specialty debtor, "which by reason of its nature only, and not by reason of any positive rule exempting it from liability for debt" is not the subject of execution at law or of physical seizure. Ager *v.* Murray, 105 U. S. 129 (see pp. 17 and 18 and cases appellant's brief).

Nor is the proposition denied that "a newspaper publication is property and *alone* and *distinct from a newspaper plant, is* salable and mortgageable." Cases cited, pp. 41 and 42 appellant's brief.

Nor has defendant denied, that the "name and good-will of a newspaper" are identical and convertible terms. The value of a newspaper is its good-will; the name identifies the newspaper in the minds of subscribers, and advertisers and miscellaneous purchasers, the income from whom is the source of revenue of the newspaper, to the publisher — the product of the good-will, name. (pp. 41, 42 and part of 43; pp. 50 to 62 App. brief).

We have shown against defendants theory as advanced in the brief—

1st. That the Western Associated Press is neither a necessary nor even a proper party to complete determination of this controversy.

2d. That certificate 64 was issued in lieu of certificate 38, each representing the same membership, and that the former was issued to the defendant "as purchaser or successor in the ownership of the newspaper St. Louis Dispatch" acquired by defendant expressly subject to our first mortgage, and particularly with notice of the equities affecting the membership in the hands of the grantor of said newspaper.

3rd. That a court of equity, in a proceeding to foreclose, in decreeing a sale of the *mortgaged* newspaper, could order the mortgagor to transfer said certificate representing such membership, in effectuation of the plain terms of the contract expressed in the mortgage deed.

4th. That, if defendant has in its possession such mortgaged newspaper, or one which a court of equity for the purposes of this suit will declare to be *the same mortgaged newspaper* (*good-will*), the court in decreeing the sale of such newspaper (held to be subject to our first mortgage), may and should order the grantee of the mortgagor having in its possession a certificate representing the membership acquired by defendant, as the purchaser of the mortgaged newspaper from the St. L. D. Co. — subject to our first mortgage and with notice of the equities affixed to the membership by his grantee, — to transfer and surrender to the purchaser of the newspaper at the foreclosure sale, such certificate.*

* We have asserted before and reiterate that in addition to the reasons given in the pages referred to, why a court of equity would hold defendant estopped to deny *the identity* of the newspapers "St. Louis Dispatch" and "St. Louis Post-Dispatch," or which is the same thing, would decree that it was the same — is the important one, that unless it can be sold as such, or unless the "St. Louis Dispatch" can be sold apart from the "Post," no transfer of the certificate can be ordered, as the newspaper must be sold before any purchaser could ACQUIRE a certificate.

To hold that the (good-will) newspaper in possession of defendant is not subject to our mortgage, and therefore, cannot be sold under foreclosure proceedings, is on the one hand, to lose utterly the security of the newspaper solemnly conveyed to us and purchased by defendant subject to our mortgage; and on the other to lose the security of the membership, the title to which defendant admits it acquired as the purchaser and successor in the ownership of *the mortgaged newspaper*. "Will equity assist to be euphemistic the tired hunter to despatch his prey;" or will it hold up its protecting hands and guard us from the last results of defendant's iniquity.

It is important to dispose of the first point, p. 8 defendant's brief, before returning to the old question, whether the court for the purpose of our mortgage will hold the old and the new newspapers (good-will) as the same.

Defendant says "a good-will cannot be sold separate and apart from the property or business on which such good-will depends for its life, value and support."

The quotation cited by him from Robertson *v.* Quiddington, 28 Beavan (English), 529, is, we think, correct, viz.: "That good-will is never a tangible thing unless it is connected with *the business itself*, from which it cannot be separated."

Now what is the business of a newspaper proprietor? Plainly that of publishing a newspaper. What is the good-will of the newspaper proprietor? To what does such good-will attach? Why of course to the publication itself, to the newspaper, to the name of the newspaper. To sell the *right of publishing* a newspaper of a given name, is to sell the good-will, which (in line with foregoing citation) is so intimately "connected with the business itself" that the old publisher has no business left and the new publisher has only one, viz., publishing the newspaper of a given name acquired by him, and collecting the income derived from its sales and advertisements.

To come within his next citation (Pom. Eq. Jur., 2 Ed., Sec. 1355) we say that "the business on which the good will of a newspaper," depends, is precisely involved in this, viz., the right to publish, and the publishing of a newspaper of a given name.

The defendant's counsel seems to forget he is dealing with "a newspaper," the good-will of a publisher is the good-will of the publication. It is not a kind or friendly feeling established between the proprietor and the community, but one between the newspaper or publication and the community.

I quoted the decision in the case of Churton *v.* Douglas,

1 Johns. Ch. 174, for the very reason that it disposes of the antiquated error that "good-will is nothing more than the probability that the old customers will resort to the old place, or it is "an advantage attaching to the possession of the house;" or it is "the chance or probability that custom will be had at a *certain place of business* in consequence of the way in which that business has been previously carried on." I quoted in my brief from Sebastian on Trademarks, p. 329, the following: "The judgment in Churton *v.* Douglas, has now established that the dictum of Lord Eldon in Cruttwell *v.* Lye, must be read as meaning that *good-will is the probability that the old customers will buy the old goods from the old firm* or *their successors in business, whether the means of identification" be the place of business or* OTHERWISE. I am not surprised therefore in reading this in defendants brief: "In the light of the above authorities we insist that there "can be no sale of the good-will of the St.Louis Dispatch "Company, because it is not averred in the bill nor stated "in the argument, *nor is it pretended that the St. Louis Dispatch Company has any plant or place of business or anything that is tangible* which *can be sold in connection with its good-will.*" (Deft's Brief, p. 13.) If this is his view we confess we have written (for him) in vain:

"The good-will of a newspaper or magazine consisting of the right to use the title under which reputation has been acquired by a publication, is another instance of valuable good-will."

Sebastian Law of Trade Mark, 335, App. Brief, 52 and 53.

"The good-will of a newspaper establishment often constitutes its largest value. They (subscribers) become

attached to the paper on account of its sentiments whether political, religious or literary, and the ability and energy with which it is conducted. * * * The good-will of a newspaper establishment is tangible. The vendee Hall could not have been permitted to appropriate the subscription list and *name* of the paper to his own use for the reason that he has sold it, although *he might perhaps have printed another newspaper in the same place.*"

Boon *v.* Moss, 70 N. Y. 473–4 — App. Brief, 53 and 54.

"The value of the good-will of a newspaper *attaches to its name*, and is scarcely, *if at all*, dependent *on the place* of publication."

2 Lindley on Partnership (Ewell), p. 860 — App. Brief 54–5.

"*The good-will of a newspaper is practically independent of* locality."

Sebastian Trade Marks, 329, and cases cited.

All this appellant's counsel has cited before, and much more. But the right to sell the newspaper, as a distinct property, disconnected from any place of publication and as a mere right to publish, is fully discussed and amply established by us in former brief and by the cases in particular.

McCormick and Carnie et al. *v.* McCubbin; Court of Sess. Cases, 1st Ser., Vol. 1, 496 and *note;*

Edinburgh Correspondent Court of Sess. Cases, 1st Ser., Vol. 1, p. 497;

In particular the cases of Ex parte Foss, 2 DeGex & Jones, 239;

Longman *v.* Tripp, 5 Bosanquet & Puller, 671;
Dayton *v.* Wickes, 17 How. 310, 311.

The insuperable barrier which defendant says (p. 12 defendant's brief) stands against "any sale of the good-will of that paper" meaning the "St. Louis Dispatch" is the fact that "*there is no such thing in existence.*"

Defendant's counsel then asserts that no "entity known as the good-will of the St. Louis Dispatch Company" exists, and adds that there exists "nothing in respect thereto on which the decree of the court can operate?" In respect to what? the good-will of the St. Louis Dispatch Company. Why, then, all you do mean to say is what you began by saying, viz.: that the paper bearing the specific name, "St. Louis Dispatch" is not any longer being published. Is this not so? If we have not rightly interpreted the language, then it must mean that the good-will of the St. Louis Dispatch Company was not identical with the good-will of the newspaper it published, but was something which attached to something *besides the publication.* Well, we have asserted (p. 1 of complaint), that the sole business of the St. Louis Dispatch Company was that of publishing a daily newspaper, or in other words its business was publishing the paper known as the St. Louis Dispatch. Also that this is the sole business of the Dispatch Publishing Company.

We have abundantly shown that the value of the publishers' trade does not attach to place of publication; it has no goods, wares or merchandise, excepting copies of the daily issues of its newspaper and space to advertizers in the same to sell. The "entity known as the good-will of the St. Louis Dispatch Co." of which defendant spoke, was simply made up of its subscribers, daily customers and advertisers. And by adding "that [there exists nothing in respect thereto on which the decree of the court can oper-

ate,] he only meant to say (even if he didn't know he only meant to say it) that the newspaper known as the St. Louis Dispatch was no longer being published. A publisher of course can have no good-will, excepting the good-will indissolubly attached to the name of his or its publication.

The error of defendant's counsel is fundamental; his misconception of the term good-will as applied to newspapers and publications, complete. Whether this ignorance is real or feigned we know not, but it is worthy of remark that in his entire brief, the gentleman does not think it worth while to notice the doctrine of the strictly newspaper cases I have cited. Defendant's argument seems to be predicated upon the idea that "good-will" of a newspaper publisher is distinct from the good-will of the newspaper itself, whereas, as has been fully demonstrated, the good-will of the publisher is the "good-will" of the publication.

It can therefore make no difference, *if the publisher issues the newspaper*, whether he has printing presses, type, machinery, etc., or not, if he can buy the white paper and procure it to be printed (I care not *where*) he sustains the life of the newspaper, the right to publish which, by the purchaser at a foreclosure sale, was the very essence of the contract contained in the mortgage. There are some remarks of mine more pertinent to the inquiry than the passage quoted from my brief in this connection by defendant's counsel. He quotes: "The good-will of a newspaper may be defined as or measured by its circulation and advertising patronage; the former indicated by its current daily sales and its subscription lists, and the latter by its advertising contracts." I concede that whilst this expresses the general nature of such good-will it does not define it as accurately as I have done elsewhere in same brief. On p. 48 I say: "The value of a newspaper is its good-will — *which*

attaches to its name. ' It is therefore the only element of property in the publication, being that upon which alone it depends for its circulation and advertizing patronage — the only source of income to the publisher." It is true I reiterate the peculiarities of a newspaper good-will, but I do so because defendant's counsel either never would (in the lower court) or never could grasp its meaning. In former brief (same page) I continue: "This good-will therefore does not grow out of or attach to a particular place of business or place of publication, in the city * * * in which it may be published;" and again I say: "That the property element of a daily newspaper is its good-will — the circulation and advertising patronage *attaching to the name of* the publication." And again: "The name of the newspaper is its means of indentification, and its trade mark or trade name." "The good-will and name of the newspaper *are therefore identical*, the name being the stamp or mark which makes the newspaper valuable." I have shown defendant that in the case of Bradbury *v.* Dickens, 27 Beavan, 61, that the name "Household Words," that is the right to publish a periodical or publication of that name — was sold for £3,550, or over $15,000.00. The right to own the name was the only thing sold (see brief of App., p. 59). In Ex parte Foss (quoted by me, p. 60, App. brief) the plant of the publisher, that is printing presses, type, machinery, etc. etc., were sold or awarded to one person and *the* name, *the right to publish a newspaper under the name* the publisher had used was sold or awarded to another.

The plant was awarded to the mortgagees, the newspapers to the assignees in bankruptcy. That is the right to publish the Morning Herald the Standard and the St. James Chronicle.

See Ex parte Foss, 2 De Gex & Jones, 230.

In Longman *v.* Tripp, 5 Bosanquet & Puller, 67, it was held that the mere right to publish a newspaper. "The Bristol Mercury" was goods and chattels, within the meaning of the Bankrupt Act (see brief of App. 61) and this was the effect of the decision in case Ex parte Foss (*supra*).

"The question put to us is, *whether the right of publishing a newspaper is a mere ideal right?* But this is absurd; for whether called copyright or property, or by any other name, it is clearly a valuable right or privilege, which may be sold and conveyed by will."

McCormick et al. *v.* McCubbin et al. (see App. Brief 56).

In Dayton Mines, 17 How. Pr. 510, 511 (*supra*): "The *valuable part* of the partnership property consists in the good-will, so to term it, of the paper — that is the celebrity which it has acquired under the name, Porter's Spirit of the Times, and the probability of that title continuing to attract custom (see App. Brief 59.)

Of course we concede, if there is no publication in existence in defendant's hands which the court will hold, for the purposes of this mortgage to be the same, then there would be no (good-will) newspaper mortgaged (or which the court would hold subject to this mortgage) and no sale of any newspaper (good-will) by a decree hereunder could be affected. But the counsel must recollect and realize that "a newspaper" can still be published, even if its proprietor and publisher does not own a press or a piece of type, or if the corporation originally owning it has gone out of existence or been dissolved. The subsequent owner may still publish it from any place. We refer him to this in answer to his question, p. 14. Having detected counsel in his preliminary and fundamental fallacy involved in his notion of what

is "good-will," all the rest of his argument upon this point (ingenious as it is, in some respects) falls. His citations are the best illustrations of his error. "In Camden *v.* Stuart, 144 U. S. 105 (I quote defendant's counsel), it is determined that while the good-will of a business may be the subject of barter and sale it must be something substantial and capable of pecuniary estimation and not shadowy.

"The opinion of the court says: *Ibid.*, 115. 'The expression good-will of the partners, which it is claimed were transferred to the corporation, are of too unsubstantial and shadowy a nature to be capable of pecuniary estimamation in this connection.'"

Again defendant cites: "It (good-will) *varies in almost every case* which may be preserved (at least to some extent) if the business be sold as a going concern but which is wholly lost if the concern is wound up, its liabilities discharged and its assets got in and distributed." Wedderburn *v.* Webberburn, 22 Beavan, p. 104; Defts. Br., p. 14.

The winding up of the concern makes no difference, if the newspaper is acquired by somebody else. What if the affairs of the New York World publishers were wound up and its newspaper, the "New York World," sold, would this relieve the New York World newspaper in the hands of its purchasers of a mortgage lien which the publishers of the New York World fixed upon it by a specific deed?

The good-will of the New York World, its business, is derived from a newpaper called the New York World, the *name* of the newspaper, the stamp or mark which gives its value, and which is bought solely because it is so stamped or marked? Surely this is clear. Is *that name* an airy nothing "of too unsubstantial and shadowy nature to be capable of pecuniary estimation?" So the name St. Louis Post-Dispatch? What would defendant part with first, the name New York World or every portion of the numerous appurtenances used in the publication of that journal?

The name St. Louis Post-Dispatch, or every other thing used in connection with its publication, including presses, type, and every possible thing appurtenant to its publication? All would go in both instances, before *the name*, which is its very stock in trade, the good-will.

The defendant makes much of the statement contained in bill to the effect that the sale under the mortgage, subject to our first, took place on the ninth of December, the first publication of the St. Louis Post-Dispatch together on the 10th, and the formal completion of the organization of the Dispatch Publishing Company and its formal taking possession and publication of the two newspapers on the 11th of December. The form of the statement as it appears in the bill may make it appear that at the sale on the 9th Pulitzer purchased the equity in the St. Louis Dispatch (newspaper), on the 10th he and Dillon (the latter the proprietor of the Evening Post) published for the first time the St. Louis Post-Dispatch, and on the 11th the Dispatch Publishing Company (having completed its organization through its promoters and chief stockholders, Pulitzer and Dillon) acquired the several newspapers from their several proprietors, Pulitzer and Dillon, and continuously thereafter published the same, entering into possession of the building then leased to the St. Louis Dispatch Company, of the presses, type, machinery, etc., connected with the printing and publishing paraphernalia then just acquired from the St. Louis Dispatch Company under the second mortgage; into the possession of the subscription lists and advertising contracts of the St. Louis Dispatch Company, its rooms, its office, etc., and proceeding to publish a paper called the St. Louis Post-Dispatch, being the St. Louis Dispatch purchased expressly for it by Pulitzer, and the Evening Post agreed to be transferred to it by Dillon, and thus really effecting the amalgamation of the two newspapers.

This is the straw at which defendant grasps and he discusses with particularity the effect of the act of Pulitzer and Dillon in procuring the consolidation of the two journals in one day and their conveyance of the *joint* good-will of the two newspapers on the next day, to the Dispatch Publishing Company, organized and promoted by themselves.

If the defendant means anything in this portion of his argument, he must mean, that our so-called confusion of the good-wills of the two newspapers occurred on the 10th of December, and not on the 11th; by the act of Pulitzer and Dillon, the promoters and substantial stockholders of the Dispatch Publishing Company, and not by the Dispatch Publishing Company.

Hence our claim that the St. Louis Dispatch and the Evening Post, and the several good-wills attaching to each were willfully confused by the Dispatch Publishing Company, is denied by our own admissions. The willful confusion occurred by Pulitzer and Dillon, the organizers of the corporation, *which published it the next day*. This is undoubtedly the very best defendant can do to destroy the effect of the point made by us that there was such a willful confusion here, of a mortgaged with an unmortgaged newspaper (good-will) as would warrant a court of equity in charging the lien of the mortgage upon the joint newspaper (good-will). He thinks by charging this willful confusion to the individual acts of Pulitzer and Dillon, the promoters, to relieve the corporation itself of any liability therefor. But, taking him on his own ground, this is absurd, for the identity of the two journals could not be destroyed *in one day*, nor would it be less a willful confusion of the mortgaged and unmortgaged newspapers (good-wills) to continue the publication in the manner begun the day before, than if no such publication had taken place on such day. In other words, by publishing

the two newspapers as one, the next day, the Dispatch Publishing Company *willfully confused the good-wills* (names) and having full notice of the lien of the mortgage attaching to the one newspaper (good-will) by its own act subjected the joint good-wills (newspaper), to our first mortgage lien.

But the purchaser from the person who effects the willful confusion stands in no better attitude than the latter. The *confused goods* are none the less subject to the lien attached to them by reason of such *willful confusion*.

The case of Kreutzer *v.* Cooney, **45 Md. 589**, cited by us at length in former brief, pp. **74, 75** et seq. illustrates fully this proposition, and we recur to the statement of facts in that case again: "The appellants brought *replevin* against the appellee for a certain quantity of type and other materials of a printing office. The plaintiff claimed under a bill of sale to them by one Stewart, of all and singular the types, forms, cases, composing stones, tables, books, etc., etc. The bill of sale was duly executed, acknowledged and *recorded*. * * * It appears from the testimony in the record and the granted instructions that the *plaintiff* permitted the materials covered by the bill of sale to remain in the possession of Stewart, to be used by him in printing a certain paper, *and that after the execution of the same* (bill of sale), *Stewart purchased a quantity of type and other materials*, similar to those above described, and mingled and used the same therewith, *and afterwards sold the whole, including what he had purchased as well as what was covered by the bill of sale, to the defendant* for a valuable consideration, who was in possession of the same at the time the writ of replevin was served."

The court in substance held:

First. That defendant acquired, by his purchase from Stewart, no title to those *goods* previously by bill of sale,

duly recorded, sold to plaintiff, even though no possession was delivered under first sale, the record notice being sufficient.

Second. *Having acquired nothing more than Stewart could lawfully sell, defendant must stand in the place of his vendor in respect to any claim or right which the plaintiff had to it,* while in the hands of Stewart.

Third. Stewart could acquire no title to the goods in his possession which he had already sold, *by mingling with it property of the same kind which he afterwards acquired,* and the doctrine of confusion of goods would operate against him.

Fourth. The foundation of that doctrine is the protection of the innocent; the loss and inconvenience must fall upon him causing the confusion.

Fifth. From the facts stated no presumption could arise that plaintiff assented to the intermixture. "They simply permitted their grantor to remain in possession and use of the property, relying, as they had a right to do, upon the recorded deed to protect their title. Whilst so in possession Stewart held the goods as agent or bailee of the plaintiffs, *and by his own act mingled them with others which he subsequently purchased. It would be very strange if by so doing he could acquire an absolute title to the goods thus left in his custody. Indeed the very reverse is what the authorities maintain.*"

The only difference between our case (aside from the difference in the nature of the property) and that cited, is, that in the cited case the person guilty of the confusion of the subsequently acquired goods with those he had already conveyed was the grantor himself; and in the one at bar, it

was the grantee of mortgaged property that wrought the confusion.

Now if the person purchasing from the grantor in the bill of sale, with constructive notice thereof, had to surrender the mingled goods, because the original goods sold could not be distinguished, would he have been in any better position if, instead of having purchased the goods, after the confusion, he had purchased original goods sold by Stewart before, and then himself mingled his own (new) goods, with those thus acquired (supposing there was no fraud and he only had the notice of the records). Or, to put this case, is the grantee of the mortgagor in a worse position, if the mortgagor itself had mingled the two good-wills (or published the newspaper jointly) than it would have been if, after purchasing the mortgaged newspaper subject expressly to the mortgage, it had then confused it with another, so that they were incapable of separation, as distinct properties. In the first case it would have been the absolute duty of the grantee of the St. Louis Dispatch Company and his grantees, to identify and separate them if he could, and if he could not, unless he lifted the mortgage, he must lose the whole. Will *he gain it* if, instead of the mortgagors being guilty of the willful confusion, he is guilty of it himself? Or, which is the contention of defendant, will the grantee of the grantee (Pulitzer & Dillon) who was guilty of the "confusion" acquire the whole, unaffected by the original lien — and so unaffected just because the grantee of the mortgagor and not the mortgagor himself had wrought the confusion? Defendant's counsel would hardly assume such a position.

(See pp. 71 to 81 App. Brief.)

The defendant adds nothing to the strength of his position by asserting that it acquired the "joint good-will." Accord-

ing to the position we have taken, viz., that the name and good-will of a newspaper are identical and inseparable, this only makes him say that defendant acquired the newspaper, St. Louis Post-Dispatch, and not the St. Louis Dispatch; that two days before it, the defendant, for the first time published it, the St. Louis Dispatch newspaper ceased publication and neither Pulitzer nor the Dispatch Publishing Co. ever published it again. When the St. Louis Dispatch newspaper ceased publication, says defendant in effect, necessarily its good-will died, and could not be revivified, and received final sepulture when the next day, the purchaser of the St. Louis Dispatch newspaper published a newspaper under the name St. Louis Post-Dispatch, and because the Dispatch Publishing Co. continued thereafter to publish a newspaper under this name. We are assuming that the good-will of the St. Louis Dispatch newspaper and that of the Evening Post, have become joint good-wills, *i. e.*, that the two newspapers were published under names which were the distinctive characteristics of each prior to such joint publication. That it was issued by a different company follows certainly upon the assertion that the St. Louis Dispatch Co. ceased to publish a newspaper and the Dispatch Publishing Co. began to publish St. Louis Post-Dispatch, deriving its name from the purchase of the St. Louis Dispatch newspaper at a sale under a second mortgage subject to our first. "But the facts," says defendant's counsel, "in the case at bar, shows that the daily paper which complainant is attempting to subject to his mortgage, not only varies in name from that mortgaged (the one being called Dispatch and the other Post-Dispatch), *but it was issued* ("in triumphant italics") *by an entirely different company not in existence at the time of the execution of the mortgage.*" Would this, if there is a mortgage on the newspaper, destroy it? The rest of his argument simply amounts to this: That it is impossible for

a company, which is confessed to have ceased business years ago, to have any good-will. It "has issued no publication and possessed no type, machinery, printing presses or the paraphernalia necessary to carry on a publication, *and has not even had a place of business.*" "Therefore," it adds, "if it (St. Louis Dispatch Co.) had conveyed its "good-will (read "newspaper") in 1878 to a separate "concern and there had been no consolidation with any "other newspaper, it is evident that the good-will of the "separate concern, would, in 1887, be an entirely different "good-will (*read-newspaper*) from that derived some years "previously." The language italicized is mine. "This is necessarily true," continues defendant's counsel, "for the subscribers, advertising patronage and daily sales of the paper are continually shifting and changing." If the fact that the subscription list and advertising patronage of a newspaper has increased manyfold during the existence of a mortgage lien charged upon it, impairs the mortgage why, then, of course any mortgage upon any newspaper is subject to defeat. To say the value of the good-will (when speaking of newspapers) has increased, is only to say the value of the *newspaper bearing a particular name has increased.* A mortgage (if there be any) charged upon the New York World newspaper, when its circulation was 25,000, is just as valid now, if the lien is unsatisfied, if its circulation is 25,000,000. The circulation is expected to increase. It will never be stationary and must increase or diminish. The mortgagee may suffer, if it diminishes, but he certainly ought not to be condemned to lose, if it should increase. You cannot mortgage the good-will unless the name is included, nor the name unless the good-will is included. If the term good-will, as applied to newspapers, periodicals and publications generally, is identical with its name and inseparable from it, I would exactly say that "the good-

will of the *World* to-day, is the same good-will it possessed in 1883."

The only effect of the increase in circulation is to make the name more valuable.

The good-will of a newspaper is measured by subscription lists, daily sales and advertising patronage; that is without subscribers and advertisers, the name of a newspaper (except from the future probability of attracting these things), would be valueless. But an indefinite list of subscribers and advertising contracts unlimited, without the newspaper (which exists only in its name) which subscribers had agreed to buy and advertisers to use — would be equally valueless. In the very nature of things the name and good-will of a newspaper must be identical.

Throughout his brief defendant speaks of the good-will of the St. Louis Dispatch Company and the Dispatch Publishing Company and Pulitzer Publishing Company — as something entirely distinct from the newspapers each published.

Defendant concludes (still under the error about the meaning of good-will): "That * * * in its inception the good-will (newspapers) was different from the one embraced in the mortgage * * * not merely because *the paper* was of a different (?) name and issued by a different company, from the one giving the mortgage, but also because the good-will (*newspaper*) conveyed to it by Pulitzer and Dillon was the *joint good-will* of the two papers Post and Dispatch (*i. e., the joint newspapers*). In other words the good-will of the Dispatch had ceased as a separate entity prior to the above conveyance" (*i. e.* the *Dispatch was no longer published except as consolidated*). "It must therefore follow that the good-will of the combined papers (*i. e., the combined papers*) is not the good-will of either prior to the consolidation (*i. e. is not the Evening Post or St. Louis Dispatch*) and hence when

the combined good-will (*combined newspapers*) was conveyed to the defendant, it was not the good-will (*newspaper*) mortgaged to complainant." The language italicized is mine.

In other words defendant cannot talk about joint good-wills unless he implies "joint publications" or "joint newspapers." And to say that to publish the two newspapers as one, *i. e.*, to join the two names in one publication, is to create "a joint good-will totally distinct from good-will of the St. Louis Dispatch and the Evening Post, means nothing more than saying that the "St Louis Post-Dispatch" is neither St. Louis Dispatch nor Evening Post. Defendant therefore only begs the whole question by reiterating in a skillful way, that the present newspaper, St. Louis Post-Dispatch, is entirely distinct from the former newspaper, St. Louis Dispatch.

"Furthermore," says defendant's counsel, "the authorities cited in brief of counsel refer to a *fraudulent intermixture of goods, merchandise and tangible personal property.*" But defendant's counsel inclines to think that an action for conversion would have lain against the persons or corporation who, he says, appropriated the good-will to their own use. If complainant had a right to sue for the conversion of the good-will, upon what is such right based? The appropriation of the newspaper title attached to which were a certain number of subscribers and advertisers? I regret to say upon its own theory we would have had no such right, for if the subscribers and advertisers attached to the St. Louis Dispatch newspaper did not subsequently become attached to the St. Louis Post-Dispatch, then it is perfectly true that the old company had no subscribers and no advertisers after the sale, or in the hands of the persons or corporation purchasing the newspaper, because the St. Louis Dispatch newspaper ceased publication, on the day of sale, the purchasers thinking proper not

to continue its publication. Thus, according to defendant's conception of the combined publication, *complainant had no rights at all at any time* because no one could affirmatively show that the subscribers of the old newspaper became the subscribers of the new, unless, indeed, upon complainant's hypothesis (which defendant rejects) that subscribers and advertisers in the newspaper sold were naturally attracted to the paper, having in it as an essential part, the characteristic words in the newspaper sold, viz., St. Louis Dispatch.

The fact that the St. Louis Post-Dispatch was published from the date of the sale of the St. Louis Dispatch newspaper, for a year at least, from the same place whence the St. Louis Dispatch was issued up to the date of its sale, is also an accidental circumstance only, in our opinion, but still a circumstance relative to the question whether persons who took the former paper, continued to take this one.

It is clear that the natural thing to do, on the part of the publishers, would be simply to appropriate the subscription list and continue sending the *joint* publication to subscribers of the St. Louis Dispatch, published there two days before. But this would not be an appropriation of "the good-will of the St. Louis Dispatch, for the very reason, that when persons buys a paper, they indentify it, by its name, and unless it has the name under which they usually buy it or *some name which so simulated it*, as to lead them to continue to buy it, as the same,— then the customers of the old paper (extinct) cannot be the customers of the new paper entirely distinct from the old. Therefore if the paper published by the Dispatch Publishing Company, was entirely distinct from the paper published by the St. Louis Dispatch Company; the publishers of the St. Louis Post-Dispatch did not convert the good-will of the St. Louis Dispatch Company to their use, we never had a right of action at any time against any one for its conversion, and we have always been wholly

without remedy, in law or equity, for the loss of the newspaper we suffered at the sale under the second mortgage. If we had an action for conversion, therefore, it was only because defendant was using the mortgaged name in its publication, to which name attached subscribers and advertisers. And if to that portion of its name no subscribers and advertizers were attracted, because it was "the name" characterizing the newspaper sold under the mortgage, then the names of the old and new paper were utterly distinct and the good-wills therefore likewise distinct.

But if this were true, why does defendant concede we had a right, at some time, to file a bill to restrain them in the use of the name St. Louis Dispatch. Speaking of the name he says, "It is true * * * waiving the question of *laches, an* injunction might have been maintained, but such application was never presented, nor is complainant asking one in this proceeding. But why could an injunction have been granted? Upon any other theory than an injunction would be granted against the use by a third person, of the name St. Louis Post-Dispatch? And when granted, upon what theory (referring to the St. Louis Post-Dispatch) would that be? There *can be only one theory*, and that is that those complained of are appropriating the good-will of the rightful publishers of the St. Louis Post-Dispatch. The restraining order would be for the protection of the good-will, the newspaper, the name, none of which can exist, as a thing of value, without the other.

For what does the use of that newspaper's name by others inimical to its owner's interests do? Oh! immediately answers defendants, — the use of that name takes away my subscribers and advertisers; the public cannot distinguish between the paper I issue and the one the persons complained of issue. But what difference does that make? The Desp. Pub. Co. or the Pulitzer Pub. Co. still has its office on Olive street, its fine Hoe presses, an unlimited amount of white

paper, type, composing stones, machinery, editorial rooms, everything to enable it to publish and distribute indefinite issues of a newspaper. Everybody in St. Louis knows where your office is. You say that the public have a good-will towards you, the publishers (not towards your paper). Let the name go and publish the Daily Bazar or anything else. What difference does it make?

But defendant and the whole world knows it makes all the difference.

If you let that other person have the name St. Louis Post-Dispatch in a publication, and you adopt another, every single dollar that went into your pockets the week before, would go into his, this. In other words, your entire subscription list and advertising patronage would leave you in the twinkling of an eye.

You might publish a newspaper, but fifty years of labor and expense would in all likelihood leave you far behind your present prosperity.

Thus it is clear, that the only ground upon which you ask for the court's restraining order is the protection of your good-will, *i. e.*, *the name* of your newspaper, without which, I believe you now admit, you would have no customers, no good-will and no business.

Then it is admitted that if ever we had a right to get a restraining order against the Dispatch Publishing Company, it was because it was destroying our good-will by taking from us the name of the newspaper to which and inseparable from which, the good-will (Sub. & Ad.) attached. If this be true, then it must be true that the good-wills of St. Louis Dispatch and the Evening Post *were* hopelessly commingled. If the good-wills were not hopelessly commingled, no value attached to the name St. Louis Dispatch at all, because its only value is the subscribers and advertisers it attracts and has attached to it.

And why would the restraining order be granted against

the use of the name St. Louis Dispatch in the name St. Louis Post-Dispatch? They are not the same name, says defendant, "a hyphenated name, composed of two words, is radically different from a single name;" p. 22, defendant's brief.

Well, the court granting the restraining order must say they so closely resemble each other that we will not let you use the words St. Louis Dispatch in connection with word Post any more. You may use the word "Post" alone, or "The Evening Post" but you cannot use the words "St. Louis" "Dispatch" or "Dispatch" in connection with the word "Post."

"We utterly fail to see how the right to such restraining order," says defendant, p. 32–3, "which has never been invoked, can aid complainant to foreclose on the good-wills of either the Dispatch Publishing Company or the Pulitzer Publishing Company, which were not embraced in the mortgage.' Only in this way "we answer" because the right to a restraining order shows that our (name) newspaper, good-will, are in the possession of the Pulitzer Publishing Company, and as we had a mortgage on that name and good-will connected with it and the name and good-will connected with it cannot be sold, because each is so conjoined and commingled with that of another name and good-will (willfully conjoined and commingled), that in order for the court to sell at foreclosure sale the name and good-will mortgaged it must sell a portion of the name and good-will not embraced therein. Otherwise the newspaper, name, good-will, cannot be sold at all, even though you took the name of our paper with full notice of the mortgage upon it, and have had ever since and now havethe full benefit of the subscription list and advertisers attaching to it.

Defendant, however, says that the authorities cited by us refer to a different class of property, that is goods, merchan-

dise and property of a tangible nature (by which I suppose he means property capable of physical seizure). It cannot refer to such incorporeal rights as the right to publish a given newspaper and to the usufruct of such publication, defendant contends.

The principle underlying the doctrine of wrongful or willful confusion of goods, etc., is one *akin* to estoppel. The person guilty of the willful confusion, if thereby they become undistinguishable, must lose the whole; not, of course, that there is a change of title, but the guilty person is not permitted to assert his own or deny the other's ownership.

The only answer to the argument is that the "mortgaged newspaper, name, good-will" was distinguishable from the unmortgaged, in the possession of defendant, and was capable of separation and re-instatement in its original form. If this were ever so, it was only at the moment of the amalgamation. An intervention immediately by an application for an injunction against the use of the name St. Louis Dispatch in the publication then begun by the Dispatch Publishing Company, and its immediate republication might have saved its life, but it is certain that at and after the maturity of the note and in fact within a week after the joint publication the value of the name and goodwill was gone, mingled forever in that of the new publication. The publishers of such a newspaper would be in the position of one first starting a newspaper. The St. Louis Dispatch might regain the patronage or some of the patronage attaching for the year then just past to the joint publication, but the experiment would have been both doubtful and expensive, and *the remedy therefore inadequate*. Patronage once thus lost would have been impossible of reclamation. To charge the lien of the mortgage upon the combined newspaper, from that time forward at least, became and now is our only remedy, so

far as enforcing our lien against the original publication is concerned.

Defendant's assertion that this class of property is not subject to the rule and decisions concerning confusion of goods, etc., is a mere assertion unsupported by reasoning, decision or analogy. The contrary opinion at least has its foundation in common sense, viz., that this class of property right, viz., a newspaper, may be so combined with another newspaper as to render the newspapers and the good-wills indissolubly connected with the names in each, incapable of indentification and separation, as distinct newspapers (good-wills). It would seem, from its nature, to be the very class of property coming most strictly within the reason of the rule, viz., the very fact that when combined there is no other possible way of subjecting either to a foreclosure under a mortgage, than by selling the whole. The suspension of publication of either as an independent newspaper, for any appreciable length of time, would absolutely destroy its circulation, and consequently its value then as a marketable property. The only adequate remedy is to sell the conjoined newspaper.

"If by one's willful misconduct the offender must bear the loss; for it has long been settled at the common law that when personal chattels, solid or fluid, are so commingled as to have become undistinguishable by the wrongful act of one owner, he can not recover for his own proportion, nor for any part of the intermixture, but the entire property vests on him whose right was invaded. Nor is the latter obliged to compensate the former. * * * For the gist of the rule appears to be, *the natural justice*, on the one hand of allowing the intentional trespasser to be loser by his own wrongful act, and on the other, *the injustice* of permitting any innocent owner to be deprived of the property without his *consent*. The intermixture being such, then, that the proportions are undistinguishable, the injured party

may *replevy* the whole or sue in damages for its conversion * * * Upon a similar reason where A takes goods doubting whether they are his own or not, and *intermingles them in order to mislead B, the true owner*, and to prevent B from taking his portion without danger of taking A's likewise, it is said that A, by such fraudulent act, loses his own property. That he runs, at least, the risk of losing his own cannot be doubted; *for reckless conduct evincing a dishonest intention*, whether shown in actively seizing one's neighbor's goods or in permitting another to intermingle them with his own, is a suitable ground for rigidly enforcing the rule of confusion. A large proportion of the later decisions in this country are those involving fraud upon creditors; cases where the party causing the confusion of goods — sometimes the debtor himself, sometimes a party in probable collusion with him — seeks to perplex and hinder officers attaching on the creditor's behalf. It may be affirmed, as a rule, that one conniving at a scheme of this sort, though not perhaps the active trespasser or the debtor, has the burden thrown upon him of identifying his own goods in order to exempt them from sale under the attachment. He, and not the creditor, must bear all the inconvenience arising out of the confusion; and if he fails to distinguish and separate what belongs to himself, the whole may be sold as the debtor's property. This is because his motives *are open to suspicion*, if not clearly fraudulent.

Schouler's Pers. Pr., Vol. 2, pp. 45 and 46;
See cases cited in Brief of App., pp. 43–44, and argument there, 71 to 81.

TRADE NAMES. — All we have said in former brief in connection with the subject of trade name as relating to this case, is briefly *that the names of the new and the old publication were so similar*, and naturally so liable to be

confounded with each other, and identified as the same — and so identified in fact by the mortgagee as the same newspaper, that defendant is estopped to deny that they were and are the same. The mortgagee here makes this very assertion:

"It is quite impossible to make out (as the counsel for "the publishers of the newspaper contend) that the new "paper *is not just an assumption of the good-will which the "old had with the public.*"

Edinburgh Newspaper Correspondent Ct. of Sess. Cases, 1st Ser., Vol. 1, p. 409;
See cases cited 63 to 69 App. Brief.

The estoppel to deny identity of the combined newspapers with the mortgaged paper, is asserted because a denial of this fact by defendant might or would be likely to defeat the equitable lien upon the certificate now representing the membership.

If the newspaper published by the owner in whose name the membership stands, is not held subject to the mortgage lien, then that membership could never be acquired by the mortgagee, under the by-laws, even if the court finds that the certificates in possession of defendants were issued in lieu of former certificate 38, to such publishers such publishers as the "purchaser or successor in the ownership of the St. Louis Dispatch newspaper, because the certificate cannot be transferred (so as to pass any rights against the association) except upon the sale of the newspaper. The court's right to sell this newspaper at the foreclosure sale being denied, the right to sell under foreclosure the certificate is also (from its peculiar nature) by necessary implication denied.

Thus, though defendant purchased our name and good-

will, and by reason thereof acquired title to the membership (the great element of value in creating a circulation), we cannot have the newspaper sold and are likewise condemned to lose the lien upon and the selling value of the certificate of membership. The defendant having acquired newspaper and membership together, is estopped to deny that the newspaper now published in conjunction with which the membership so acquired and used, is not the same newspaper.

ESTOPPEL.

Defendant thinks proper to belittle the estoppel doctrine claimed by us to be applicable against defendant in every aspect of the latter's relation to the *whole* of the *original mortgaged* property. We do not desire to repeat the argument under head of estoppel contained in former brief. But in answer to defendant we may recur to some of the facts upon which our plea of estoppel is founded.

The St. Louis Dispatch Company conducted and issued its newspaper at and from No. 111 N. 5th street, St. Louis, at the date of the sale under the second morgtage subject to our first. The Dispatch Publishing Company acquired the newspaper, St. Louis Dispatch, subject to our first, and opened up for business right off at the old stand, 111 N. 5th street, and published the St. Louis Post-Dispatch, using in its publication everything, and nothing else, save what it had acquired as the purchaser of the newspaper and appurtenant property, i. e., the presses, type, composing stones, galleys and all property in the building mentioned, all of which was included in our first morgtage. It continued to receive the news, dispatches, etc., and to enjoy all the rights and privileges formerly enjoyed by the St. Louis Dispatch Company in "The Western Associated Press," by virtue of share 38, standing then and for a long time after * * * * on the books of the "associa-

tion" in the name of the St. Louis Dispatch Company's going into possession on the 10th or 11th of December, 1878 on the first of February, 1879 (following), it paid the interest installment then due under the terms of the note, following that up by paying each successive *two month's* interest instalment coming due, until Dec. 1st, 1879, when the principal matured. In the meanwhile, during the year elapsing from Dec., 1878, to Dec., 1879, using up, selling or trading off old presses, type, machinery, etc., and substituting new, in the same building, so that, in fact, at the expiration of the year it had none of the original mortgaged presses, type, etc., etc. The terms of the conveyance or instrument under which the Dispatch Publishing Company acquired the title, the mortgagee and no third person has had the opportunity of learning; it was never recorded or in any manner published. "Hence," as I said in former brief, "it is not known what were the terms of the several sales, or what the Dispatch Publishing Company agreed to do with reference to the former mortgage nor in respect to any after acquired property, which it, the Dispatch Publishing Company, might add to or substitute in the plant. Nor could it be ascertained whether or not it assumed the payment of the mortgage debt as part of the consideration of the sale to it of the property" (App. Br. 86). Now to state this whole history and to rely upon all these acts and omissions concatenated together, is not to assert that the mere payment of interest on the debt is equivalent to an assumption of the mortgage debt (defendant's brief, 27 and 28). I never asserted in any portion of my argument that any such conclusion followed upon any such interest payment. Nor did I anywhere state that merely to buy a piece of property, real or personal, *subject* to a mortgage, was to impose upon such purchaser a personal obligation to pay the mortgage debt (Deft's brief, 25 and 26).

Nor would I even say that the sale by a person holding mortgaged personalty, of a portion thereof, or all of it, indeed, would create against any property purchased by him a lien or charge upon the person so selling any liability upon the mortgage debt; or any liability except for conversion of another's goods. But when I say all this, it does not follow, that the mortgagee did not have the right to believe — *and that all the acts taken together were not either expressly designed or naturally calculated* to induce the mortgagee to believe, as he certainly did, that it had agreed with its grantee to *put itself in the shoes of the mortgagor.* That is to hold all after-acquired property placed in the plant subject to the mortgage, including of course the combined newspapers (good-wills) and (or) that defendant had assumed the payment of the mortgage debt. Which of course the mortgagee did believe.

Now, there is no question about the language of an agreement, because *there is no language of any agreement before us at all.* The title deeds never saw the light; there is no record of them; we were put into that state where we were compelled to rely upon the good faith of defendant, unless we were to assume from the outset that their whole purpose was to defraud. "* * * The Dispatch Publishing Company had no right to make direct misrepresentations to complainant," defendant admits. Though defendant's counsel adds "it was not responsible if complainant probably drew *erroneous inferences* from certain facts." The only erroneous inference we drew was that defendant intended to act honestly. Did it have the purpose in changing the name to cheat us out of our newspaper; to invite legal proceedings by us for the protection of the St. Louis Dispatch newspaper; to defraud us of the membership, which could only be sold to the purchaser of the newspaper, or did it intend to hold their publication subject to our mortgage and (or) to pay the

mortgage debt. Were we permitted to draw inferences from its acts, and if so, are we to lose because we chose to draw conclusions consistent with honesty and fair dealing and not with fraud and deceit. For if there was no personal assumption of the payment of this mortgage debt, no honest reason existed for the payment of the interest, unless the other inference was intended to be drawn, that the newspaper was held and to be held by it subject to the mortgage, and that *it had agreed so to hold it.* But if it seeks to deny this fair conclusion, defendant must go further still. It must assert that it not only intended to cheat us out of our newspaper; to defraud us of the membership (concerning which it took no action at all during the year); but to absolutely "gut" the whole house No. 111 N. Fifth street, selling every part and portion, at intervals during the year, of the property, presses, type, etc., furniture, etc., and with the proceeds refitting the plant, and thus absolutely destroy our entire plant. To talk about a suit for a conversion, our right to an injunction, our remedy against the Associated Press, is all very well, but have we not established a clear right to this equitable relief against a defendant, whose attitude now and for years past, is an open confession of its design to cheat and defraud complainant out of its entire security and its entire debt. There were then payments of interest even after the whole property, newspaper, plant and all were being changed. To place this act on a par with that of one paying interest on a mortgage of land acquired subject thereto, speaks poorly for defendant's faculty for comparison.

"*The elements of the estoppel with their qualifications should be considered in connection with the elements of the action of deceit; to which there is the closest correspondence.*"

N. 8 Big. Est. 4th Ed. and cases cited.

When defendant's counsel says defendant "was not the guardian of complainant nor responsible for unwarranted inferences drawn by it," and then argues for 50 pages defendant has no part of the property it acquired subject to our first mortgage, and has not had it since shortly after its purchase thereof, it only confesses what we charge, as the legal conclusion from the foregoing facts; either that defendant acted so as to deceive complainant about its real purpose, viz., to defraud complainant of its security, *or* so as to induce it to believe it had agreed to hold the property in its entirety (newspaper and plant and membership) subject to the mortgage and (or) had agreed to pay the mortgage debt. Which was it? (see App. Brief, 86 et seq.).

LIMITATION AND LACHES.

We have discussed before fully enough the charge of laches and plea of limitation. Briefly we have shown that if we had a right to foreclose our mortgage, we had (at all events and at the very least) ten years in which to do so. If defendant's newspaper is subject to the mortgage, or if from the principles we have laid down, it must be so held, then our right to proceed for a foreclosure was not barred. Nor could any court hold by analogy to the statutes regulating the *recovery* of personalty by replevin or damages for its conversion, that our right to foreclose would be cut off; for this would be equivalent to saying that we only had five years to file the foreclosure suit. Nor would the fact (if such fact was stated) that defendant laid claim to all or any part of the property in dispute, asserting openly that it was its own, for the period of five years, bar such a proceeding, as this would be equivalent to saying that a statute forbidding the bringing of an action for conversion of personalty or damages, *conferred upon such adverse holder an indefeasible title*, so that such possession in an

action for conversion could be proven as a bar to recovery without pleading it. In other words that such a statute affects the right of property and not the remedy alone against it (see App. Br. 97 et seq. and 102).

As we are not seeking to recover any particular piece of property from the Western Associated Press, or to recover the possession of any certificate, or to recover damages for the conversion of any personal property of any kind, excepting as it may be incident to the principal relief asked; the plea of the statute of limitations is utterly senseless here. As long as our right to foreclose exists we can foreclose. Cases cited by defendant, p. 34, refer to assertion of adverse title to *real estate for the required ten years' period against the world.* "Ten years' adverse possession of *real estate* will not only bar an action of ejectment, *but it will confer title upon the possessor.*"

Defendant does not insist very strenuously upon his plea of laches, and finally confines it to the loss, it would be likely to suffer, if the court decreed the sale of the certificate 93 when it sells the newspaper. He does not state it this way, but this is what he means.

He very correctly asserts that members of this association are bound to pay certain assessments to defray the expenses of the association in procuring the news, etc., etc. Why, this is *the essence of the privilege of membership.* He acquires (and this is the great value of the membership) thereby the right and privilege of getting the news at reduced rates. The payment of the assessments does not add to the value of the membership, the value of the membership consists solely in the members being able to purchase the news from the association (by means of weekly assessments) far cheaper than any single individual could possibly do. It is certain that defendant has lost nothing by any delay; on the contrary the delay has been a distinct gain, for upon the sale of the membership.

their right to get the news at these reduced rates would cease. The payment of these assessments is precisely that which constitutes the enjoyment of the privileges of the association. The longer the delay the longer will he participate in the benefits of this association, *i. e.*, the longer he will be able to get the news at reduced and phenomenally reduced rates. This privilege being the value of the membership, the *so-called laches* would result not disastrously but beneficially for the Dispatch Publishing Co. and its successor.

We observe defendant's counsel does not comment on laches further. We however discussed the subject fully in the last pages of former brief to which we respectfully refer the court.

Respectfully Submitted
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Solicitor for Appellant